Supreme Court, U.S.
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No. ——

IN THE

Supreme Court of the United States

MOTION PICTURE INDUSTRY PENSION AND HEALTH PLANS,
Petitioner,

v.

N.T. AUDIO VISUAL SUPPLY, INC.
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Do multiemployer employee benefit plans retain the burden of proving that employer contributions are due, even where the failure of an employer to comply with its statutory duty to maintain records under ERISA makes it impossible or impracticable for the plans to do so?

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OPINIONS BELOW

The decision of the court of appeals is reported at 259 F.3d 1063 and is reproduced in the appendix to this petition ("Pet.App.") at pages 1a -14a, *infra*. The decision of the district court is unreported, and is reproduced at Pet.App. pages 15a-23a, *infra*.

GROUNDS FOR JURISDICTION

The judgment of the court of appeals was entered on August 7, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 209(a)(1) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C.

§ 1059(a)(1), imposes a duty on an employer to maintain records of the number of hours worked by employees. In relevant part, that section states:

> Except as provided by paragraph (2), every employer shall, in accordance with the regulations prescribed by the Secretary, maintain records with respect to each of his employees sufficient to determine the benefits due or which may become due to such employees.

Section 107 of ERISA, 29 U.S.C. § 1027, also requires in part that:

> Every person subject to a requirement to file any report or to certify any information therefor under this subchapter. . . shall maintain records on the matters of which disclosure is required which will provide in sufficient detail the necessary basic information and data from which the documents thus required may be verified, explained, or clarified, and checked for accuracy and completeness. . . .

The full text of the statutes is set out in the Appendix. (Pet.App. 24a-26a).

STATEMENT OF THE CASE

This case involves the ability of multiemployer employee benefit plans to enforce the obligation of employers to make contributions to those plans. The court below held, in a two to one decision, that an employee benefit plan retains the burden of proving that employer contributions are due, even when the failure of an employer to comply with its statutory duty to maintain records will make it impossible or impracticable for the plan to meet this burden.

This holding will substantially undermine the ability of multiemployer plans both to collect employer contributions and to deliver promised benefits to plan participants. Employers will be able to evade their obligations to make contributions to a plan precisely because of their failure to

comply with the obligation to maintain records pursuant to Sections 209(a)(1) and 107 of ERISA, 29 U.S.C. §§ 1059(a)(1) and 1027.

The decision directly conflicts with the decisions of three other circuit courts and with decisions of this Court.

A. Relevant Facts

Petitioners are jointly trusteed, multiemployer pension and health plans (the "Plans") maintained pursuant to collective bargaining agreements between the International Alliance of Theatrical Stage Employes ("IATSE") as well as 33 other unions, and approximately 1,840 employers in the entertainment industry throughout the United States.

The collective bargaining agreements require contributions by employers to the Plans for every hour worked by its employees who perform work covered under the collective bargaining agreement ("covered work"). The contributions paid to the Plans are allocated to a separate defined benefit pension plan, a defined contribution pension plan and a health plan for active and retired participants.

The amount of contributions reported directly affects employees' eligibility for benefits. In order for employees to qualify for health benefits, and in order to earn a vested year of credit under the defined benefit pension plan, an employee must have contributions reported for a certain minimum amount of hours per year. Thus, the failure of an employer to accurately report contributions for an employee could deprive that employee of those benefits.

The failure of an employer to make contributions can also negatively impact the level of benefits provided to employees. Since a certain portion of the contribution is allocated to a defined contribution pension plan, the failure of an employer to accurately report contributions will directly affect the amount of money deposited into that employee's

account. Additionally, since a portion of the contributions are allocated to a defined benefit pension plan and to the health plan, the failure of an employer to accurately report contributions will result in fewer assets available to those plans from which the trustees of the plan can pay for benefits.

There is a large proportion of work in the entertainment industry which is freelance, i.e., employees are employed for one production for a limited period of time. Because of the freelance nature of the industry, many employees do not have regular employment and rely on a number of employers to report hours to the Plans. If one or more of those employers fail to report hours, or fail to keep accurate records, the participant may lose pension or health eligibility, or receive lower benefits.

Respondent N.T. Audio Visual Supply, Inc., (hereinafter "N.T. Audio" or the "Employer"), is a company which makes optical sound negatives for motion pictures. It was signatory to a collective bargaining agreement with the IATSE, which represented about 18 of its employees. Pursuant to that collective bargaining agreement, N.T. Audio was obligated to make contributions to the Plans.

The Trustees of the Plans audited N.T. Audio's records for the period from January 1, 1989 through March 20, 1993. Although the Employer made some contributions for employees covered by the IATSE bargaining agreement during that period, the Employer's records reflected that it had not made contributions for all hours worked by those employees during that period of time. In addition, the Employer had not made contributions with regard to certain cash payments which Employer documents indicated had been made to some employees. The Employer did not keep records from which the Plans' auditors could determine whether all of the work performed by the employees was work covered by the collective bargaining agreement. Furthermore, the Plans found that the Employer failed to keep

records supporting its position that the cash payments were not for covered work. (Pet.App. at 2a-3a, 7a).

Thus, while the Plans were able to determine from the Employer's records the total amount of time worked by employees and the amount of total compensation paid to those employees, they could not determine the extent to which the work performed, or the compensation paid was for covered work. Since the Employer's records did not permit a determination of the amount of time spent by the employees doing covered work, the Plans concluded that all of the time spent by those employees, and all of the compensation paid to them, was for covered work. (Pet.App. at 5a-7a). As a result, they determined that N.T. Audio owed the Plans approximately $32,000 in unpaid contributions based on over 6,000 hours of covered work and certain cash compensation, for which no contributions were paid. (Pet.App. at 2a). In response to the Plans' demand for payment, N.T. Audio objected to the finding but failed to provide any documents to substantiate its contention that the work performed was not covered work for which contributions were owed.

B. Course of Proceedings Below

On May 13, 1997, the Plans filed suit in the Central District of California, alleging that N.T. Audio had failed to pay the contributions identified in the audit. The Plans invoked federal jurisdiction pursuant to 29 U.S.C. §§ 185, 1132 and 1145. The Plans filed a motion for summary judgment on December 15, 1997 and provided evidence that N.T. Audio failed to comply with the reasonable record keeping requirements of ERISA. The District Court entered summary judgment in favor of the Plans on January 6, 1998 and, following a denial of reconsideration, entered a final judgment in favor of the Plans on February 23, 1998. (Pet.App. at 15a-23a). N.T. Audio appealed.

On August 7, 2001, the United States Court of Appeals for the Ninth Circuit reversed the District Court decision. (Pet.App. at 1a-14a). The Ninth Circuit acknowledged that under ERISA, 29 U.S.C. § 1059(a)(1), employers have a duty to maintain records of the number of hours worked by employees. Citing its previous decision in *Brick Masons Pension Trust v. Industrial Fence & Supply*, 839 F.2d 1333 (9th Cir. 1988), the court noted that once the Plans produced evidence raising "genuine questions" about the accuracy of the employer's records and the number of hours worked by the employees, the burden shifts to the employer to come forward with evidence of the precise amount of work performed.

However, the court held that the Plans were also obligated to show that the unreported hours and unreported compensation "corresponded to covered work." (Pet.App. at 7a). The court held that while "it is true that each employee in question had performed some covered work for N.T. Audio, the auditors did not establish that any of the unreported hours corresponded to this covered work." (Pet.App. at 7a). The court held that the conclusion of the auditors and the Plans that all of the work was covered work was therefore without any basis.

Judge Pregerson, dissenting, noted that the new standard announced by the majority "imposes a difficult burden of production on the Plan Trustees and rewards employers who blatantly violate the record keeping duties imposed by ERISA." (Pet.App. at 10a). He further stated that the majority opinion "contravenes the policy concerns on which we based our decision in *Brick Masons*." (Pet.App. at 11a).

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THIS COURT AND OTHER CIRCUITS

The decision below is inconsistent with previous decisions of this Court, the Ninth Circuit's previous holdings, and decisions in the Sixth, Eighth and Eleventh Circuits. On the other hand, the decision below is consistent with a decision of the Seventh Circuit.

It is particularly important to resolve this conflict among the circuit courts since many multiemployer employee benefit plans—like the petitioner—are national in scope, including participating employees and employers which reside throughout the United States. The result of these conflicting decisions is that these national plans, and many employers, will be forced to operate under conflicting rules of law.

The decisions of the Sixth, Eighth and Eleventh Circuits, as well as the *Brick Masons* decision of the Ninth Circuit, each rely on the decision of this Court in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), a case involving the Fair Labor Standards Act ("FLSA"). In *Anderson*, this Court held that where an employee contends that he or she was not properly compensated under that statute, and where an employer fails to keep proper records in conformity with its statutory duty to do so, the burden is on the employer "to come forward with evidence of the precise amount of the work performed or evidence to negate the reasonableness of the inference to be drawn from the employee's evidence." 328 U.S. at 687-688.

The Eleventh Circuit was the first court to consider this issue in the context of ERISA. In *Combs v. King*, 764 F.2d 818 (11th Cir. 1985), the court noted that under both ERISA and the FLSA, employers have similar record keeping obligations, and both statutes were enacted to protect em-

ployees. The court found the approach in *Anderson* directly applicable and, as a consequence, once a plan audit raised a reasonable inference that work had been performed on which contributions were due to the plans, the burden shifted to the employer to produce records contradicting the reasonable inference that contributions were due regarding all of the work in question. 764 F.2d at 827.

The *Combs* decision was followed by the Ninth Circuit in *Brick Masons Pension Trust v. Industrial Fence & Supply*, 839 F.2d 1333 (9th Cir. 1988). In that decision, the court noted that "[b]oth the language and the legislative history of ERISA clearly require employers to keep records of their employees' hours in order to permit the calculation of benefits due." 839 F.2d at 1338. Since the "records employers are required to keep . . . may be the only evidence available to employees to prove that their employers have failed to compensate them in accordance with the statute," the court held that "[a]n employer cannot escape liability for his failure to pay his employees the wages and benefits due to them under the law by hiding behind his failure to keep records as statutorily required." *Id*; *see also Operating Engineers Pension Trusts v. B&E Backhoe*, 911 F.2d 1347, 1354 (9th Cir. 1990) (following *Brick Masons*).

In *Michigan Laborers' Health Care Fund v. Grimaldi Concrete*, 30 F.3d 692 (6th Cir. 1994), the court followed "the sensible approach" taken by the Eleventh Circuit in *Combs* and the Ninth Circuit in *Brick Masons*. 30 F.3d at 696. Like *Combs* and *Brick Masons*, this case involved a situation where employees performed both covered and non-covered work. Because the employer had no records for the majority of the work in question, the plan auditors were unable to determine the amount of covered work. The court held that since the employer had no records for 80 percent of the work performed, the employer was liable for contributions "on all hours worked during a period in which it

has been demonstrated that some covered work was performed." *Id.* at 697.

In *Stanton v. Larry Fowler Trucking*, 52 F.3d 723, 727-28 (8th Cir. 1995), the Eighth Circuit adopted the same reasoning in a closely related context. In that case, the issue was whether an employee had received adequate notice of the termination of health insurance under the Consolidated Omnibus Budget Reconciliation Act ("COBRA"). Noting that the employer had an ERISA obligation to maintain records of such notice pursuant to § 209, 29 U.S.C. § 1059 (and pursuant to the analogous obligation of plan administrators found at 29 U.S.C. § 1027), the court held that where the employee maintains that he did not receive such notice, the employer may not maintain otherwise where the employer has failed to keep records of the notice.

In contrast to the decisions of these circuits, the Seventh Circuit has required plans to prove that contributions are due even when an employer has failed to maintain records which would permit the plans to do so. In *Illinois Conference of Teamsters and Employers Welfare Fund v. Steve Gilbert Trucking*, 71 F.3d 1361 (7th Cir. 1995), the employer maintained that only 80 to 90 percent of the hours for which the employees were paid was covered work, but the employer did not maintain any records documenting that claim. While the court agreed that the employer had the burden of coming forward with evidence once it was shown that it had not maintained records, the court found sufficient an affidavit from the employer simply making the assertion in conclusory form, thereby eviscerating the utility of the *Combs/Brick Masons* decisions. Only after the trust funds undertook the risk and expense of a trial following remand was judgment entered against the employer. *Illinois Conference of Teamsters and Employers Welfare Fund v. Steve Gilbert Trucking*, 953 F. Supp. 1026, 1032-1034 (C.D. Ill.), *aff'd w/o opinion*, 129 F.3d 1267 (7th Cir. 1997).

The Ninth Circuit in the decision below has now joined the Seventh Circuit in erecting a substantial barrier to the ability of employee benefit plans to economically enforce contribution obligations of participating employers. The decisions of these two circuit courts conflict with the decisions of three other circuit courts, which have properly held that the failure of an employer to maintain records as required by the statute precludes the employer from contending that contributions were not due.

II. THE DECISION BELOW CONTRAVENES THE INTENT OF ERISA BY UNDERMINING THE FINANCIAL SOLVENCY OF EMPLOYEE BENEFIT PLANS, MAKING IT IMPOSSIBLE OR IMPRACTICABLE FOR PLANS TO COLLECT CONTRIBUTIONS FROM EMPLOYERS AND DEPRIVING EMPLOYEES OF BENEFITS TO WHICH THEY ARE ENTITLED

A. ERISA Mandates Expeditious Judicial Enforcement of Employer Contribution Obligations

The legislative history of ERISA shows that one of the primary purposes of Congress was to expedite the judicial enforcement of the collection of delinquent contributions owed by employers. In 1980, Congress amended ERISA by enacting the Multiemployer Pension Plan Amendments Act of 1980 ("MPPA"). The 1980 Act included revisions of § 502, 29 U.S.C. § 1132, and a new § 515 of ERISA, 29 U.S.C. § 1145. The new § 1145 created an ERISA right of action to recover delinquent contributions from a participating employer. This objective was further accomplished through the elimination of defenses deemed extraneous to the contract enforcement action, and by assuring that the employee benefit plans would be made whole for all losses arising from employer delinquency.

In *Central States, Southeast and Southwest Areas Pension Fund v. Central Transport*, 472 U.S. 559 (1985), this Court recognized this legislative intent in construing the application of ERISA Sections 502 and 515. The Court reiterated that a central purpose of ERISA is to insure the "financial soundness" of employee benefit plans "by making sure that if a worker has been promised a defined pension benefit upon retirement . . . he will actually receive it." [1] 472 U.S. at 569. The Court noted that "one of the principal congressional concerns motivating the passage of the Act, [was] that plans should assure themselves of adequate funding by promptly collecting employer contributions." *Id.* at 580.

In order to accomplish these goals, and consistent with the fact that "one of the fundamental common-law duties of a trustee is to preserve and maintain trust assets," *Id.* at 572, the Court held that ERISA does not simply authorize audits of participating employers, but in fact mandates that trustees act diligently to "prevent participant employers from gaining even temporary use of assets to which the plan is entitled." *Id.* at 573. Consistent with this obligation, the trustees have a "fiduciary duty . . . to gain immediate use of trust assets for the benefit of the trust, to avoid the time and expense of litigation." *Id.* at 580.

Barriers to collection of delinquencies—such as those created by the decision below—are contrary to the policies underlying ERISA that employers not be "free to cheat their employees or bury their reporting mistakes," *Northern California Retail Clerks v. Jumbo Markets*, 906 F.2d 1371, 1373 (9th Cir. 1990), and are inconsistent "with Congress' intent in ERISA to provide 'broad remedies' and 'to remove jurisdictional and procedural obstacles which in the past

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[1] The Court noted that these goals were not confined to pension benefits, and instead were applicable to all employee benefit plans. *Central States*, 472 U.S. at 570 n.9.

appear to have hampered effective . . . recovery of benefits due to participants.'" *Connors v. Hallmark & Son Coal Co.*, 935 F.2d 336, 343 (D.C. Cir. 1991).

B. The Decision Below Makes it Impossible or Impracticable for Plans to Collect Contributions

Essential to the statutory scheme designed by Congress to permit expeditious enforcement of employer contribution obligations are the record keeping obligations imposed on employers by § 209(a)(1) of ERISA, 29 U.S.C. § 1059(a)(1) and the corresponding duties imposed by § 107, 29 U.S.C. § 1027. Section 209(a)(1) requires an employer to "maintain records with respect to each of his employees sufficient to determine the benefits due or which may become due to such employees." Without such records, plans cannot effectively fulfill their obligation to preserve and maintain trust assets by means of an effective audit program. *See Central States*, 472 U.S. at 573.

Requiring plans to prove that contributions are due when an employer fails to maintain records required by these statutory provisions will make it impossible or impracticable for plans to collect contributions. As a result, the value of plan assets will be substantially discounted, thereby depriving employees of benefits while rewarding employers who violate the record keeping requirements of ERISA.

1. *Plans Will Often Be Unable to Prove That Contributions Are Due*

Unless an employer maintains adequate records, it will be unlikely that such information will be available to the plans. The observation of this Court in *Anderson*, *supra*, in the context of a Fair Labor Standards Act claim, is no less true in the ERISA collection context:

> . . . it is the employer who has the duty under § 11(c) of the [Fair Labor Standards] Act to keep proper records of

> wages, hours and other conditions and practices of employment and who is in the position to know and to produce the most probative facts concerning the nature and amount of work performed. Employees seldom keep such records themselves; even if they do, the records may be and frequently are untrustworthy.

Anderson, 328 U.S. at 687. Similarly, if employers fail to keep records from which a plan may determine whether contributions are due, it is unlikely that a plan will be able to prove that such contributions are due.

The court below ignored the implications of the employer's failure to keep records when it found that the Plans were obligated to come forward and demonstrate that "any of the unreported hours corresponded to covered work." (Pet.App. at 7a). The court below was not simply requiring the Plans to show that the individual employees at times performed covered work, since the court acknowledged that the Plans had already shown that all of the employees in question did, in fact, perform covered work some of the time. (Pet.App. at 7a). Instead, the court was requiring the Plans to show that the particular hours in question were "covered." For the reasons stated by this Court in *Anderson*, this will often be impossible.

2. *Even If It is Not Impossible to Prove That Contributions Are Due, Plans Will Be Forced to Undertake Expensive and Risky Litigation in Order to Attempt to Collect Contributions*

Even if it is not impossible to gather information that certain work is covered, it will be most often impracticable. Putting the burden on the plan to come forward with evidence that the work was covered will require auditors to spend an inordinate amount of time documenting the nature of the work done. In the absence of records, that inquiry will likely

involve interviews with employees and other employer personnel and, in some cases, preparing employee affidavits. The expense of such audits would be so great that plans will often reasonably choose not to incur the cost, particularly if it requires neutral plan staff to solicit management or labor cooperation in order to obtain employee statements for trust fund audits.

Even if employee affidavits or other evidence can be obtained, the plan's claim can apparently be refuted by contrary—albeit undocumented—employer contentions. The result will be uncertain and costly litigation. That this possibility is more than theoretical can be seen from experience in cases which have adopted the Seventh Circuit's *Steve Gilbert* formulation. That approach has resulted in an increased number of trials in cases which, in other circuits, could have been resolved through summary judgment. *See, e.g., Central Pension Fund v. Murphy's Tire*, 1998 U.S. Dist. LEXIS 19369, *22-25 (N.D.N.Y. 1998) (unreported) (no summary judgment where employer president claimed work was performed outside of union's jurisdiction and, therefore, was not covered); *Hanley v. Adam*, 1998 U.S. Dist. LEXIS 13495, *20-27 (N.D. Ill. 1998) (unreported) (denying motion for summary judgment because employer questioned audit calculation); *Composition Roofers Union Local No. 30 Welfare Trust Fund v. L.A. Kennedy, Inc.*, 1996 U.S. Dist. LEXIS 5737, *17-21 (E.D. Pa. 1996) (unreported) (no final judgment where employer raised questions about plan auditing methods). The increased number of trials, of course, leads to higher costs, greater risks and more unnecessary litigation, all of which further deplete valuable plan assets.

The uncertainties of litigation will significantly discount the value of delinquent contributions. Prior to engaging in collection actions, plans will have to consider the increased expenditures of plan assets required to collect delinquent contributions and the increased risks of litigation. This

evaluation will often result in a greater discounting of the contribution obligation of employers who have failed to maintain adequate records.

3. *The Barriers to Collection of Contributions Endangers the Delivery of Benefits to Employee Participants*

The failure of an employer to make contributions will adversely affect the amount of assets available in general to the plans. When a plan has fewer assets, it stands to reason that it will be able to provide fewer benefits to all participants. In addition to this impact on the overall assets available to the plans, the failure of an employer to make contributions could also substantially and adversely affect the eligibility of individual participants for health and pension benefits, as well as the level of benefits provided to those individuals. This is because the eligibility for, and level of, benefits are often based on the amount of covered work performed by individual employees.[2]

Therefore, if an employer does not make contributions for an employee, that employee might not be eligible for health benefits and might not earn a year of credited service under the pension plan. This is of particular concern in a freelance industry such as the entertainment industry, where many employees do not have steady work and find it difficult to

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[2] Employees must have a minimum of 600 hours reported in a six month period to obtain initial eligibility for health coverage. Thereafter, employees continue to be eligible for health benefits if they have 300 reported hours in a subsequent eligibility period. The Health Plan Summary Plan Description specifically provides that "eligibility for benefits is contingent upon whether your employer(s) makes the appropriate contributions to the Plan in accordance with the Trust Agreement." Employees must earn a minimum of 400 hours of credited service in order to earn one year of credit in the defined benefit pension plan.

work sufficient hours under the collective bargaining agreement to qualify for these benefits.

Even if an employee works enough to be eligible for certain benefits, the failure of an employer to make contributions on the employee's behalf will result in fewer assets allocated to that individual's account maintained under the defined contribution pension plan.

4. *The Potential Problems Created by the Decision Below Will Result in Even Greater Abuses by Employers in the Future*

The decision below will provide a road map for employers who wish to evade their contribution obligations to multi-employer employee benefit plans. As pointed out by the dissent in *N.T. Audio*, the approach adopted by the majority "rewards employers who blatantly violate the record keeping duties imposed by ERISA." (Pet.App. at 10a). Employers will be rewarded not only by avoidance of contribution obligations, but also by the cost savings engendered by their failure to keep records. It is reasonable to expect that competing employers in the same industry will be tempted to cease keeping records in order to obtain the same cost savings.

As noted above, because of the high costs and risks of litigation, plans will often be forced to compromise on collection demands when employers fail to keep records. The decision below thus threatens to seriously undermine, on a broad scale, the intent of Congress to expedite plan collection actions in order to promote the financial health of those plans and permit the delivery of promised benefits.

CONCLUSION

Based on the foregoing, Petitioner respectfully requests that this Court grant this Petition for Certiorari.

Respectfully submitted

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 98-55611

MOTION PICTURE INDUSTRY PENSION & HEALTH PLANS,
Plaintiff-Appellee,

v.

N.T. AUDIO VISUAL SUPPLY, INC.,
Defendant-Appellant.

November 1, 1999, Argued and Submitted,
Pasadena, California August 7, 2001, Filed

BEFORE: Harry Pregerson, John T. Noonan, and Diarmuid F. O'Scannlain, *Circuit Judges*.

OPINION

O'SCANNLAIN, *Circuit Judge*:

We must decide, in an action under the Employment Retirement Income Security Act ("ERISA"), whether trustees of employee benefit plans produced sufficient evidence of employer liability on summary judgment to shift the burden of production.

I

N.T. Audio, a corporation engaged in the business of creating optical sound negatives, employs approximately eighteen local union members. N.T. Audio is a party to collective bargaining agreements with the International Alliance of Theatrical State Employees and Motion Picture

Operators ("IATSE") and the Alliance of Motion Picture and Television Producers ("AMPTP"). Pursuant to these agreements, N.T. Audio was obligated to make contributions on behalf of its employees who were performing work covered under those agreements to two pension and employee benefits plans: (1) the Motion Picture Industry Health Plan and (2) the Motion Picture Industry Pension Plan (collectively, the "Plans"). The collective bargaining agreements also called for N.T. Audio to report to the Plans every hour worked by or guaranteed to their employees covered by those agreements.

The employer-union collective bargaining agreements provided remedies of liquidated damages and interest in the event of N.T. Audio's default in payment.

Furthermore, trustees of the Plans were authorized to audit the employment and payroll records of N.T. Audio to ensure that it complied with its contribution responsibilities.

In due course, trustees of the Plans initiated an audit of N.T. Audio's records, covering the period from January 1, 1989 through March 20, 1993. At the conclusion of the audit, in December 1995, they informed N.T. Audio that it owed the Plans approximately $32,000. N.T. Audio objected to the auditors' findings in a letter dated January 23, 1996.

On May 13, 1997, the Plans filed suit in the Central District of California under ERISA provisions 29 U.S.C. §§ 1132 and 1145, alleging that N.T. Audio had failed to pay the delinquent contributions identified in the audit. The Plans filed a motion for summary judgment on December 15, 1997, to which they attached a declaration of their chief auditor, Teri Goldstein, reciting that N.T. Audio had failed to keep adequate records and that the Plans' auditors had raised serious questions as to whether N.T. Audio employees had performed covered work for which contributions were not paid. Goldstein stated by declaration that "often, the absence

of detailed records made it impossible to determine the precise number of hours or type of work performed by [the employees]."

N.T. Audio filed its opposition to the motion for summary judgment on December 23, 1997, responding that the Plans' motion should fail because "they have not identified what work these individuals have done." On February 23, 1998, the district court entered judgment in favor of the Plans. N.T. Audio timely filed this appeal.[1]

II

Both sides agree that the controlling case on appeal is *Brick Masons Pension Trust v. Industrial Fence & Supply, Inc.*, 839 F.2d 1333 (9th Cir. 1988). Brick Masons establishes that a trustee in an ERISA contribution case can make a showing that will shift the burden to the employer to come forward with evidence of the precise amount of covered work performed by its employees. *Id.* at 1337-40. The dispute between the Trustees and N.T. Audio is focused primarily on the quantum of the showing that the Trustees must make in order to effect such a shift in the burden of production.

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[1] Before we were able to consider the merits of this appeal, we had to deal with the jurisdictional bar presented by *Local 159 v. Nor-Cal Plumbing, Inc.*, 185 F.3d 978, 981-84 (9th Cir. 1999) (holding that, because an ERISA plan is not a "participant, beneficiary,[or] fiduciary," subject matter jurisdiction did not exist under § 502(e) of ERISA over a suit brought by such a plan). Subsequent to oral argument, on April 10, 2000, we ordered the Plans to show cause why this appeal should not be dismissed for their failure to join their fiduciaries as necessary parties to this suit. In due course, on August 30, 2000, we granted the Plans' motion to join two members of their Board of Directors, Managing Director Hank Lachmund and Director Bruce C. Doering (collectively, the" Trustees"), as fiduciary plaintiffs in this suit. Once fiduciaries of the Plans were joined, jurisdiction was established pursuant to § 502(e) of ERISA, which grants exclusive jurisdiction to the district courts to hear" civil actions under this subchapter brought . . . by a participant, beneficiary, [or] fiduciary . . . ." 29 U.S.C. § 1132(e)(1).

In Brick Masons, union fringe benefit funds brought an action against an employer to recover contributions for certain masons employed by one of the employer's nonunion subsidiaries, who performed covered work for that same employer's unionized subsidiary. *Brick Masons*, 839 F.2d at 1336-37. There, the district court expressly found that while there was evidence that some covered work had been performed by the nonunion masons, there was no evidence of the extent of that work. *Id.* The district court concluded, therefore, that any damage award would be too speculative. *Id.*

On appeal, we reversed the district court and held that 29 U.S.C. § 1059(a)(1) of ERISA imposes a duty on employers to maintain records of the number of hours worked by employees. *Id.* at 1338. Consequently, we held that "once the trustees produce evidence raising genuine questions about the accuracy of the employer's records and the number of hours worked by the employees, the burden shifts to the employer to come forward with evidence of the precise amount of work performed." *Id.* at 1338. That is, "once the Trust Funds proved the fact of damage" and the employer's" failure to keep adequate records," the burden shifted to the employer to come forward with evidence of the "extent of the damage." *Id.* at 1338-39. The "fact of damage [was] certain" in Brick Masons because "it was undisputed that the Trust Funds received no contributions for work performed by [35 masons] even though they did some covered work during the relevant time period." *Id.* at 1338 (emphasis added). The only uncertainty was "in the amount of damages arising from the statutory violation by the employer." *Id.* at 1338 (quoting *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 688, 90 L. Ed. 1515, 66 S. Ct. 1187 (1946)). It was on this question that "the burden shifted to [the employer] to come forward with evidence of the extend of the covered work performed . . . ." 839 F.2d at 1338-39.

Thus, under Brick Masons, once the Trustees show 1) that N.T. Audio failed to keep adequate records, and 2) that there exist some employees who (a) performed covered work that was (b) unreported to the trust funds, then the burden shifts to the N.T. Audio to show the extent of the unreported covered work for those employees.[2]

There is little doubt that the Trustees met their first threshold burden, proving that N.T. Audio failed to keep adequate records. The Plans submitted in support of their motion for summary judgment declarations of the auditors who examined those records. Both auditors testified that N.T. Audio's records were insufficiently clear to determine precisely how

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[2] The dissent complains that this formulation "raises the standard of proof required of the Plan Trustee." Dissent at 10230. It argues that while under Brick Masons "the Plan Trustee is merely required to 'raise genuine questions' about the accuracy of the employer's records and the number of hours worked," our "formulation requires the Plan Trustee to 'show' that he satisfied the elements of his burden." The dissent concludes (without explanation) that this increases the burden on the Plan Trustee because "it is more difficult to 'show' that something exists, than it is to 'raise a genuine question' whether something exists."

Whatever the merits of the dissent's contentions, Brick Masons itself demonstrates that this formulation is not a change at all. In Brick Masons, we explicitly held that the burden shifted when the trustees "proved" the facts of damage and the employer's failure to keep adequate records. 839 F.2d at 1338-39 (emphasis added). We also observed that" producing evidence raising genuine questions about the accuracy of the employer's records and the number of hours worked by the employees" would suffice to shift the burden. *Id.* at 1338 (emphasis added). These two statements are entirely consistent; indeed, evidence that "proves" the fact of damage and the employer's failure to keep adequate records necessarily "raises genuine questions" about the accuracy of the employer's records and the number of hours worked by employees. That we today describe the trustees' duty as requiring them to "show" the facts of damage and the employer's failure to keep adequate records is therefore entirely consistent with our precedent. *See* BLACK'S LAW DICTIONARY 1385 (7th ed. 1999) (defining "show" as "to make (facts, etc.) apparent or clear by evidence; to prove") (emphasis added).

many hours of covered work were performed by N.T. Audio's employees. Specifically, the Plans' senior auditor, Teri Goldstein, declared that she examined the available payroll records, timecards, and W-2s of all employees who had hours reported to the Plans during the audit period, and found some of them were compensated for more hours of work than had been reported. Goldstein further noted that while the documents occasionally revealed the nature of the services for which employees were being paid, they more frequently failed to identify the type of work performed. A second auditor, Steven Smith, confirmed these declarations, stating that he found N.T. Audio's records to be insufficiently detailed to allow him to identify the type of work performed. The affirmative declarations of the Plans' auditors are sufficient to meet the Trustees' first threshold burden.

Moreover, N.T. Audio effectively admitted the inadequacy of its own records when, in responding to a discovery request for all documents identifying the duties of employees, it responded that it "[did] not have such documents." If the records did, in fact, exist, N.T. Audio could simply have produced them, thereby refuting the Trustees' threshold showing. But it did not. This admission can "constitute a basis for summary judgment." *In re Pacific Express, Inc.*, 780 F.2d 1482, 1489 (9th Cir. 1986).

The Trustees did not, however, produce evidence meeting their other threshold burdens, proving that there existed some employees who (a) performed covered work that was (b) unreported to the Plans. Although the Trustees produced evidence to establish that N.T. Audio failed to report some of the hours worked by its employees, it did not produce evidence establishing that those unreported hours corresponded to covered work.

In previous cases, employee benefit plans have made the requisite showing that some of the unreported hours corresponded to covered work by submitting testimony by

employees who performed the unreported work. E.g., *Brick Masons*, 839 F.2d at 1340; *Combs v. King*, 764 F.2d 818, 820 (11th Cir. 1985). In this case, the Plans did not submit any employee testimony along with their motion for summary judgment, and, instead, offered only the testimony of their auditors. A close reading of this testimony, however, reveals that the Plans' auditors failed to show that any of the unreported hours corresponded to covered work.

There were two categories of unreported hours identified by the auditors. The first category was based on discrepancies between "payroll records, timecards, and W-2s "and the data reported by N.T. Audio to the Plans. Rather than establish that any of these discrepancies corresponded to covered work, however, the auditors appeared to presume without any basis that all of these hours were for covered work, concluding: "Since no documents were made available to explain the discrepancy, these additional hours for which pay was received were classified as underreported [covered] hours."

The second category was based on cash payments to employees unreported to the Plans. Again, rather than establish that any of these payments corresponded to covered work, the auditors appeared to presume without any basis that all of these hours were for covered work, concluding: "In the absence of such documentation, payments made to individuals who were known participants in the Plans were presumed to be for covered work."

Although it is true that each employee in question had performed some covered work for N.T. Audio, the auditors did not establish that any of the unreported hours corresponded to this covered work. As a result, the Trustees cannot prove "the fact of damage" that some of the unreported hours corresponded to covered work, and have,

therefore, failed to meet their threshold burdens.[3] Thus, it was inappropriate for the district court to grant summary judgment in favor of the Plans.

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[3] Despite the Trustees' failure to meet their threshold burdens, the dissent would nonetheless affirm because, in its view," it is reasonable to infer . . . that the work performed by the employees was work covered by the collective bargaining agreement" (even though no proof of this was offered) because the Trustees demonstrated that (1)" the employees had a history of performing covered work for the defendant-employer," and (2) "some work performed by these employees was unreported to the plans." Dissent at 10231. The dissent, however, misapprehends the use of a burden-shifting approach in ERISA actions of this kind.

Burden-shifting alters the normal procedure—i.e., that a plaintiff must plead and prove its damages—and instead forces a defendant to disprove a plaintiff's claimed but unproven damages. This alteration is appropriate only where the fact of damage is itself certain, but the amount is uncertain because of an employer's substandard bookkeeping practices. *See Brick Masons*, 839 F.2d at 1338 (quoting *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 688, 90 L. Ed. 1515, 66 S. Ct. 1187 (1946)). In such cases, the normal rule is eschewed in favor of burden-shifting because "it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts." *Id.*

In contrast, the dissent's approach would allow trustees to sue an employer that keeps shoddy records—and, if the employer cannot disprove the trustees' alleged but unproven damages, to obtain a recovery—without proving that the employer's substandard bookkeeping caused the trustees any damage. Such a broad expansion of Brick Masons is not supported by the policy behind the use of burden-shifting in ERISA cases, and indeed, might raise constitutional concerns. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180, 145 L. Ed. 2d 610, 120 S. Ct. 693 (2000) (explaining that to satisfy the standing requirements of Article III, a plaintiff must show, *inter alia*, that it has suffered "an 'injury in fact' that is . . . concrete and particularized and . . . not conjectural or hypothetical").

III

For the foregoing reasons, the district court's grant of summary judgment to the Plans, through, now, their Trustees, is

REVERSED and REMANDED.

PREGERSON, *Circuit Judge*, dissenting:

The majority today fashions a rule that imposes a difficult burden of production on the Plan Trustees and rewards employers who blatantly violate the record keeping duties imposed by ERISA. I respectfully dissent.

I.

The majority decision erodes the *Brick Masons* standard for shifting the burden of production in an ERISA contribution case where the employer has failed to keep adequate records, as required by ERISA. In *Brick Masons Pension Trust v. Indus. Fence & Supply, Inc.*, 839 F.2d 1333 (9th Cir. 1988), our circuit followed the Eleventh Circuit and adopted for ERISA cases the burden-shifting scheme established by the Supreme Court in the context of Fair Labor Standards Act cases. Under this scheme, "once the trustees produce evidence raising genuine questions about the accuracy of the employer's records and the number of hours worked by the employees, the burden shifts to the employer to come forward with evidence of the precise amount of work performed." *Brick Masons*, 839 F.2d at 1338 (citing *Combs v. King*, 764 F.2d 818, 822-27 (11th Cir. 1985)).

In *Brick Masons*, we adopted this burden shifting rule based on the legislative history of ERISA and public policy considerations. "Both the language and the legislative history of ERISA clearly require employers to keep records of their employees hours in order to permit the calculation of benefits due." 839 F.2d at 1338 (emphasis added). We stressed in Brick Masons the importance of the record keeping requirements of ERISA when we stated that the "records employers are required to keep by . . . ERISA may be the only evidence available to employees to prove that their employers have failed to compensate them in accordance with the statute." *Id.* Finally, we determined that the burden-shifting scheme was necessary to ensure that employers did not benefit from

their failure to maintain records. "An employer cannot escape liability for his failure to pay his employees the wages and benefits due to them under the law by hiding behind his failure to keep records as statutorily required." *Id.*

Under our holding in Brick Masons, a Plan Trustee meets the burden of production in an ERISA contribution case by producing evidence that: (1) raises genuine questions about the accuracy of the employer's records; and (2) raises genuine questions about the number of hours worked by the employees. *Id.* at 1337-38. In Brick Masons, we did not specifically address the question of who bears the burden of proving that the unreported work was covered by the collective bargaining agreement.

Faced with this question, the majority reformulates the Brick Masons burden shifting scheme. The majority's new formulation requires the Plan Trustee to "show that (1) the [defendant employer] failed to keep adequate records, and (2) that there exist some employees who (a) performed covered work that was (b) unreported to the trust funds. "Maj. Op. at 10225. The majority's new formulation increases the burden on the Plan Trustee by requiring the Plan Trustee to show that the unreported work is covered by the collective bargaining agreement. This added requirement contravenes the policy concerns on which we based our decision in Brick Masons. Additionally, the majority's new formulation raises the standard of proof required of the Plan Trustee. Under Brick Masons the Plan Trustee is merely required to" raise genuine questions" about the accuracy of the employers records and the number of hours worked. The majority's new formulation requires the Plan Trustee to "show" that he satisfied the elements of his burden. The new formulation increases the burden on the Plan Trustee because it is more difficult to "show" that something exists, than it is to "raise a genuine question" whether something exists.

The facts of this case illustrate the difference between the Brick Masons standard and the majority's new formulation. In this case, the Plan Trustees introduced evidence of an audit showing that the defendant employer, N.T. Audio, maintained incomplete records about the number of hours worked, and the work performed by its employees. As noted by the majority, N.T. Audio conceded the inadequacies of its records in its answers to interrogatories. Maj. Op. at 10226. The Plan Trustees also introduced evidence that N.T. Audio failed to report to the Plans work performed by employees who had previously performed covered work for N.T. Audio. Maj. Op. at 10226-27.

Under the majority's new formulation, the burden would not shift to the defendant, N.T. Audio, because the Plan Trustees did not show that the unreported hours were for work covered by the collective bargaining agreement. But under the Brick Masons standard, the Trustees would have satisfied their burden. In order to shift the burden of production to the employer under Brick Masons, the Trustees simply needed to raise genuine questions about the number of hours worked by the employees. As the majority concedes, the Trustees demonstrated that the employees had a history of performing covered work for the defendant-employer. And, as the majority further concedes, the Trustees demonstrated that some work performed by these employees was unreported to the Plans. It is reasonable to infer from these facts that the work performed by the employees was work covered by the collective bargaining agreement. Thus I would affirm the district court's determination that the Trustees raised genuine questions about the number of covered hours worked by the employees. *See Combs*, 764 F.2d at 827 ("The trustees met their burden when they produced affidavits of two of Mrs. King's employees and of the certified public accountant. These affidavits raised genuine questions about the accuracy of Mrs. King's records and the number of hours worked by her employees.") (emphasis added).

The majority's new formulation of the Plan Trustees' burden runs contrary to the policies identified in Brick Masons. The employer's records may be the only reliable evidence the Trustees can use to establish liability for contributions to the Plans. Under the majority's formulation, an employer stands to benefit from its failure to keep records as required by ERISA. *See* 29 U.S.C. § 1059(a)(1) ("every employer shall . . . maintain records with respect to each of his employees sufficient to determine the benefits due or which may become due to such employees"); *Central States Pension Fund v. Cent. Transport, Inc.*, 472 U.S. 559, 573, 86 L. Ed. 2d 447, 105 S. Ct. 2833 (1985); ("[*ERISA*, 29 U.S.C. § 1059] requires employers to maintain records on employees and to furnish to benefit plans the information needed for the plans' fulfillment of their reporting duties."). The majority suggests that the Plan Trustees in this case could attach affidavits from the employees to establish that the unreported work was covered by the collective bargaining agreement. This assumes that employees will be able to remember in detail the number of the hours and type of work performed in the past.[1] If this assumption proves false, the Plan Trustees would not meet their burden under the majority's formulation, and the case would end without recourse.

In contrast, under Brick Masons, once the Plan Trustees meet their burden to raise genuine issues, the burden shifts to the employer to prove that the unreported hours were for covered work. The employer could meet its burden in various ways. Of course, if the employer maintained accurate and reliable records documenting the number of hours and the type of work performed by each employee as required by ERISA, such records should suffice to end the litigation. *See* 29 U.S.C. § 1059. If, as is true in this case, the employer fails

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[1] This burden also assumes that employees will be willing to testify against their employers.

to abide by its statutory duty to maintain these records, the employer may still introduce other forms of evidence to meet its burden.

Michigan Laborers' Health Care Fund v. Grimaldi Concrete, Inc., 30 F.3d 692 (6th Cir. 1994) is the only circuit opinion to consider the question of who has the burden of producing evidence that work performed was work covered under the collective bargaining agreement. In Grimaldi Concrete, relying upon Brick Masons, the Sixth Circuit held that "an employer's failure to maintain adequate records shifts the burden to the employer to prove that the work performed was covered or not covered." *Id.* at 696. The employer in Grimaldi Concrete failed to keep records showing "which laborers performed covered work, or how many hours were spent performing covered work." *Id.* at 694. Because of this record deficiency, the trust fund "auditors were unable to determine the amount of work for which contributions were due." *Id.* The Sixth Circuit found that the employer's failure to maintain records shifted the burden to the employer" to prove what work was covered and what was not covered." *Id.* at 696.

In short, I would adhere to the burden shifting standard articulated by Brick Masons, and hold that a Plan Trustee satisfies its burden of production by showing that the employer kept inadequate records and by raising genuine questions as to whether employees have performed covered work for which contributions were not paid. Applying this standard to the instant case, I would find that the Plan Trustees satisfied their threshold burden and affirm the district court.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

[Filed Feb. 20, 1998]

CV-97-3617 R (RNBx)

MOTION PICTURE INDUSTRY PENSION AND HEALTH PLANS,
Plaintiffs,

v.

N.T. AUDIO VISUAL SUPPLY, INC.,
Defendant.

JUDGMENT

This action came on for hearing before the Court, Honorable Manuel L. Real, District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED that plaintiffs, the Motion Picture Industry Pension and Health Plans, recover of the defendant, N.T. Audio Visual Supply, Inc., the sum of $70,673.34, with interest thereon at the rate provided by law, and the plaintiffs' costs of action.

Dated at Los Angeles, California, this 20th day of February, 1998.

MANUEL L. REAL
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

[Filed Jan. 5, 1998]

CV-97-3617 R (RNBx)

MOTION PICTURE INDUSTRY PENSION AND HEALTH PLANS,
Plaintiffs,

v.

N.T. AUDIO VISUAL SUPPLY, INC.,
Defendant.

JUDGMENT ON PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

This action came on for hearing before the Court, on January 5, 1998, Hon. Manuel L. Real presiding, on a Motion for Summary Judgment, or in the alternative, Summary Adjudication of Issues. The evidence presented by all parties having been duly considered, and all issues having been fully heard, and a decision having been rendered by this Court,

IT IS ORDERED AND ADJUDGED that judgment be found on behalf of plaintiffs the Motion Picture Industry Pension and Health Plans, in the amount of $46,385.84.

DATED: Jan. 5, 1998.

MANUEL L. REAL
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

[Filed Jan. 5, 1998]

CV-97-3617 R (RNBx)

MOTION PICTURE INDUSTRY PENSION AND HEALTH PLANS,
Plaintiffs,

v.

N.T. AUDIO VISUAL SUPPLY, INC.,
Defendant.

STATEMENT OF UNCONTROVERTED FACTS AND CONCLUSIONS OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE, SUMMARY ADJUDICATION OF ISSUES [Local Rule 7.14.1]

The following Statement of Uncontroverted Facts and Conclusions of Law is presented pursuant to Local Rule 7.14.1 in support of the Motion for Summary Judgment, or in the alternative, Summary Adjudication of issues of plaintiffs Motion Picture Industry Pension and Health Plans ("the Plans").

UNCONTROVERTED FACTS

1. Plaintiff Plans are separate and individual Taft-Hartley funds as defined at Section 302(c) of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. § 186(c), and "fiduciaries" and "multi-employer plans" so defined in Sections 3(1)(A), (21)(A) and (37)(A) of the Employee Retire-

ment Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1002(1)(A), (21)(A) and (37)(A) of the Employee Retirement Income Security Act of 1974 ("ERISA") 29 U.S.C. §§ 1002(1)(A), (21)(A) and (37)(A). *See* Complaint for Damages and Injunctive Relief ("Complaint"), ¶ 5; Answer to Complaint for Damages and Injunctive Relief ("Answer to Complaint"), ¶ 1; FRCP Rule 8(d).

2. Plaintiffs are expressly named as third party beneficiaries in a series of collective bargaining agreements between the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada ("IATSE") and a multi-employer bargaining unit known as the Alliance of Motion Picture and Television Producers ("AMPTP"). *See* Basic Agreement of 1988, (attached as Exhibit "2" to the Declaration of Kevin P. Doran, hereinafter "Doran Decl."); and Basic Agreement of 1990, (Doran Decl., Exhibit "3") (collectively, "the Basic Agreement"), Arts. XII, XIII, XIIIA, XIV, and XXV, pp. 11-17, 31-32, and pp. 13-23, 42-44, respectively.

3. Defendant N.T. Audio Visual Supply, Inc. ('N.T. Audio") is a California corporation, and an employer within the meaning of Section 2(2) of the National Labor Relations Act, 29 U.S.C. § 152(2) and Section 3(5) of ERISA, 29 U.S.C. § 1002(5), and is engaged in commerce, in an industry affecting commerce, within the meaning of Sections 3(11) and (12) of ERISA, 29 U.S.C. §§ 1002(11) and (12). *See* Complaint, ¶ 7; Answer to Complaint, ¶ 1; FRCP Rule 8(d).

4. On or around November 16, 1987, defendant N.T. Audio signed an Agreement of Consent, binding it to the Basic Agreement negotiated between IATSE and AMPTP, and "any amendments, modifications, extensions, supplementations or renewals" thereof. (Doran Decl., ¶ 2; Exhibit "1").

5. Defendant N.T. Audio is also signatory to a Trust Acceptance form, binding it to the terms of the Motion

Picture Health and Welfare Fund Agreement and Declaration of Trust, the Motion Picture Industry Pension Plan, and the Motion Picture Industry Individual Account Plan (collectively, "the Declarations of Trust"). (Doran Decl., ¶ 5, Exhibit "10").

6. Defendant N.T. Audio admitted to being bound by the Basic Agreement, the subsidiary local agreements, and the Declarations of Trust. *See* Complaint, ¶ 7; Answer to Complaint, ¶ 1; FRCP Rule 8(d); (Declaration of Satoshi Yanai, ¶¶ 2 and 4, Exhibits "20" and "22").

7. During the audit period from January 1, 1989 to March 20, 1993, N.T. Audio was bound by the Basic Agreements of 1988 and 1990, and the Declarations of Trust. (Doran Decl., ¶¶ 3, 5).

8. Pursuant to provisions in the Basic Agreements of 1988 and 1990, defendant was also bound during the audit period to collective bargaining agreements negotiated on behalf of IATSE-affiliated local unions. (Doran Decl., ¶ 4).

9. These local collective bargaining agreements included the Local 683 Agreement of August 1, 1990; the Local 695 Agreements of August 1, 1988 and August 1, 1990; the Local 695C Agreements of August 1, 1988 and August 1, 1990; and the Local 776 Agreement of August 1, 1990. (Doran Decl., ¶ 4).

10. Pursuant to the provisions of the Basic Agreement, defendant N.T. Audio is required to make contribution payments to the Plans for every hour worked by or guaranteed to their employees covered under the terms of the Basic Agreement. (Doran Decl., ¶ 7; Exhibit "2", pp. 11-17, 31-32; Exhibit "3", pp. 13-23, 42-44).

11. Pursuant to the provisions of the Declarations of Trust, any default in payment of contributions subjects N.T. Audio to interest and liquidated damages, as well as the payment of

the delinquent contributions. (Doran Decl., ¶ 9; Exhibit "11", pp. 43-43e; Exhibit "12", pp. 3-3 to 3-5, Exhibit "13", pp. 3-2 to 3-3).

12. Pursuant to the provisions of the Declarations of Trust, N.T. Audio agreed to allow the Plans to audit its employment and payroll records that may be pertinent to its contribution obligations. (Doran Decl., ¶ 11; Exhibit "11", pp. 44; Exhibit "12", p. 3-5; Exhibit "13", p. 3-3).

13. Pursuant to the provisions of the Declarations of Trust, N.T. Audio agreed to be liable for all costs, including reasonable attorney's fees and court costs, incurred by the Plans to enforce collection of benefit contributions, interest, and liquidated damages. (Doran Decl., ¶ 10; Exhibit "11", pp. 43-43e; Exhibit "12", pp. 3-3 to 3-5; Exhibit "13", pp. 3-2 to 3-3).

14. In order to ensure defendant's compliance with its contribution obligations, a field audit of N.T. Audio's records was conducted during the period from July 14 to July 29, 1993. (Declaration of Teri Goldstein, hereinafter "Goldstein Decl.", ¶ 3; Declaration of Steven Smith, hereinafter "Smith Decl." ¶ 3).

15. Prior to said audit, defendant was notified of the records that were to be made available to the auditors so that a thorough audit could be conducted. (Doran Decl., ¶ 12, Exhibit "14").

16. The records of N.T. Audio were incomplete, and insufficient to determine the precise amount or type of work performed for all the employees of N.T. Audio. (Goldstein Decl., ¶ 4, 7, 9; Smith Decl., ¶ 7).

17. Discrepancies in defendant's records raised serious questions as to the accuracy of defendant's reports to the Plans. (Goldstein Decl., ¶ 4, 7, 10; Smith Decl., ¶ 6).

18. Based on the information available to them, the auditors reached the conclusion that contributions were owed on nineteen individuals, for a total of 6,383.1 delinquent hours. (Goldstein Decl., ¶¶ 6, 14, 17, Exhibit "B"; Smith Decl., ¶ 6).

19. By letters dated December 20 and December 21, 1995, defendant was informed that it owed total contributions, interest, and liquidated damages of $12,961.08 to the Motion Picture Industry Pension Plan, and $11,719.57 to the Motion Picture Industry Health Plan. An additional $7,695.00 was owed to cover audit costs. (Doran Decl., ¶ 13, Exhibits "15" and "16").

20. At the request of the Plans, defendant signed a tolling agreement on or about February 6, 1996. (Doran Decl., ¶ 14, Exhibit "17").

21. Under the terms of the tolling agreement, all statutes of limitation arising from the results of this audit would be tolled from December 21, 1995, until either party withdrew from the agreement pursuant to written notice. (Doran Decl., ¶ 14, Exhibit "17").

22. No written withdrawal from said tolling agreement by N.T. Audio has ever been received by the Plans. (Doran Decl., ¶ 15).

23. The complaint in this action was filed on May 13, 1997. *See* Complaint.

24. To date, defendant has not paid any of the delinquent contributions identified to it in the letters of December 20 and 21, 1995. (Doran Decl., ¶ 16).

25. Defendant has not raised evidence to establish that the individuals identified in the audit were not employees performing work covered under the terms of the Basic Agreement and the local agreements.

CONCLUSIONS OF LAW

1. By signing the Agreement of Consent, N.T. Audio became bound to abide by the terms of the Basic Agreements of 1988 and 1990. *Construction Teamsters Health and Welfare Trust v. Con Form Construction Corporation*, 657 F.2d 1101, 1103 (9th Cir. 1981).

2. By signing the Trust Acceptance, N.T. Audio became bound to abide by the terms of the Declarations of Trust. *Id.*

3. N.T. Audio is bound by its admission that it is bound to the Basic Agreement, the local agreements, and the Declarations of Trust. FRCP Rules 8(d), 36(a).

4. N.T. Audio is required to submit contributions to the Plans pursuant to any provisions in the Basic Agreement or Declarations of Trust that mandate such contributions. Section 515 of ERISA, 29 U.S.C. § 1145.

5. The Plans are entitled to examine employer records to determine an employer's compliance with its contribution obligations. *Santa Monica Culinary Welfare Fund v. Miramar Hotel Corporation*, 920 F.2d 1491, 1494-95 (9th Cir. 1990).

6. Compliance audits are not limited to those employees whom the employer identifies as being covered by the collective bargaining agreement. *Central States, Southeast and Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 566-69; 105 S. Ct. 2833, 2838-39 (1985).

7. N.T. Audio is required to maintain employment and payroll records sufficient to allow the Plans to determine the accuracy of its contributions. Section 209 of ERISA, 29 U.S.C. § 1059; *Brick Masons Pension Trust v. Industrial Fence & Supply. Inc.*, 839 F.2d 1333, 1337-38 (9th Cir. 1988).

8. Since the inability of the Plans to determine the precise amount of contributions owing is due to N.T. Audio's failure

to maintain adequate records, the burden of establishing the precise amount and type of work performed is shifted to defendant. *Brick Masons*, 839 F.2d at 1338.

9. Since N.T. Audio cannot meet its burden of establishing the precise amount and type of work performed through competent evidence, the reasonable assumptions of the auditors are presumed correct. *Id.*, at 1339.

10. The Plans are entitled to liquidated damages, interest, and costs, including attorney's fees, for contribution delinquencies of defendant N.T. Audio. ERISA 1132(g)(2). *Operating Engineers Pension Trust v. B & E Backhoe, Inc.*, 911 F.2d 1347, 1355 (9th Cir. 1990) (attorney's fees); *Operating Engineers Pension Trust v. Beck Engineering & Surveying Co.*, 746 F.2d 557, 569 (9th Cir. 1984) (liquidated damages); *Operating Engineers Pension Trust v. Reed*, 726 F.2d 513, 514 (9th Cir. 1984) (attorney's fees and interest).

11. The Plans are the prevailing party for purposes of Section 502(g)(2) if *any* of the disputed contributions that are the subject of this suit are determined to be owed to the Plans. *B & E Backhoe*, 911 F.2d at 1355.

DATED: December 12, 1997

HOLGUIN & GARFIELD

By: /s/ Satoshi Yanai
SATOSHI YANAI

Attorneys for Plaintiffs the Motion Picture Industry Pension and Health Plans

MANUEL L. REAL

Jan. 5, 1998

U.S.D.J.

APPENDIX E

UNITED STATES CODE

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29 USCS § 1059 (2001)

TITLE 29. LABOR

CHAPTER 18. EMPLOYEE RETIREMENT INCOME SECURITY PROGRAM
PROTECTION OF EMPLOYEE BENEFIT RIGHTS
REGULATORY PROVISIONS
PARTICIPATION AND VESTING

§ 1059. Recordkeeping and reporting requirements

(a)(1) Except as provided by paragraph (2) every employer shall, in accordance with regulations prescribed by the Secretary, maintain records with respect to each of his employees sufficient to determine the benefits due or which may become due to such employees. The plan administrator shall make a report, in such manner and at such time as may be provided in regulations prescribed by the Secretary, to each employee who is a participant under the plan and who—

(A) requests such report, in such manner and at such time as may be provided in such regulations,

(B) terminates his service with the employer, or

(C) has a 1-year break in service (as defined in section 203(b)(3)(A) [29 USCS § 1053(b)(3)(A)]).

The employer shall furnish to the plan administrator the information necessary for the administrator to make the reports required by the preceding sentence. Not more than one report shall be required under subparagraph (A) in any 12-month period. Not more than one report shall be required under subparagraph (C) with respect to consecutive 1-year breaks in service. The report required under this paragraph

shall be sufficient to inform the employee of his accrued benefits under the plan and the percentage of such benefits which are nonforfeitable under the plan.

(2) If more than one employer adopts a plan, each such employer shall, in accordance with regulations prescribed by the Secretary, furnish to the plan administrator the information necessary for the administrator to maintain the records and make the reports required by paragraph (1). Such administrator shall maintain the records and, to the extent provided under regulations prescribed by the Secretary, make the reports, required by paragraph (1).

(b) If any person who is required, under subsection (a), to furnish information or maintain records for any plan year fails to comply with such requirement, he shall pay to the Secretary a civil penalty of $10 for each employee with respect to whom such failure occurs, unless it is shown that such failure is due to reasonable cause.

HISTORY: (Sept. 2, 1974, P.L. 93-406, Title I, Subtitle B, Part 2, § 209, 88 Stat. 865.)

UNITED STATES CODE

29 USCS § 1027 (2001)

TITLE 29. LABOR

CHAPTER 18. EMPLOYEE RETIREMENT INCOME SECURITY PROGRAM
PROTECTION OF EMPLOYEE BENEFIT RIGHTS
REGULATORY PROVISIONS
REPORTING AND DISCLOSURE

§ 1027. Retention of records

Every person subject to a requirement to file any report or to certify any information therefor under this title or who would be subject to such a requirement but for an exemption or simplified reporting requirement under section 104(a)(2) or (3) of this title [29 USCS § 1024(a)(2) or (3)] shall maintain records on the matters of which disclosure is required which will provide in sufficient detail the necessary basic information and data from which the documents thus required may be verified, explained, or clarified, and checked for accuracy and completeness, and shall include vouchers, worksheets, receipts, and applicable resolutions, and shall keep such records available for examination for a period of not less than six years after the filing date of the documents based on the information which they contain, or six years after the date on which such documents would have been filed but for an exemption or simplified reporting requirement under section 104(a)(2) or (3) [29 USCS § 1024(a)(2) or (3)].

HISTORY: (Sept. 2, 1974, P.L. 93-406, Title I, Subtitle B, Part 1, § 107, 88 Stat. 850; Aug. 5, 1997, P.L. 105-34, Title XV, Subtitle A, § 1503(d)(5), 111 Stat. 1062.)

MOTION FILED
DEC 0 5 2001

(2)

No. 01-678

IN THE

Supreme Court of the United States

MOTION PICTURE INDUSTRY PENSION AND HEALTH PLANS,
Petitioner,

v.

N.T. AUDIO VISUAL SUPPLY, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF THE DIRECTORS GUILD OF AMERICA-PRODUCER PENSION PLANS AND HEALTH PLAN, THE PRODUCER-WRITERS GUILD OF AMERICA PENSION PLAN, THE WRITERS' GUILD-INDUSTRY HEALTH FUND, AND THE SCREEN ACTORS GUILD-PRODUCERS PENSION AND HEALTH PLANS IN SUPPORT OF PETITIONER

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* IN SUPPORT OF PETITIONER[1]

The Directors Guild of America-Producer Pension Plans and Health Plan (the "Directors Guild Plans"), the Producer-Writers Guild of America Pension Plan and the Writers' Guild-Industry Health Fund (the "Writers Guild Plans"), and the Screen Actors Guild-Producers Pension and Health Plans (the "SAG Plans") (this brief will refer to the *amici* collec-

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[1] Statement required by Supreme Court Rule 37.6: This Motion and Brief were authored in their entirety by attorneys at O'Melveny & Myers LLP, counsel for *amici curiae*, which entities were the only persons or entities which made a monetary contribution to the preparation and submission of this Motion and Brief.

tively as the "Entertainment Industry Plans") respectfully move this Court, pursuant to Rule 37.2 for leave to file the attached brief *amici curiae* in support of the petition for certiorari in this case. The consent of attorney for the petitioner has been obtained. The consent of attorney for the respondent has not been obtained.

The Entertainment Industry Plans collect contributions pursuant to numerous collective bargaining agreements between employers in the entertainment industry (including the production of commercials) and use these contributions to provide pension and health benefits to directors, writers, and actors throughout the television and motion picture entertainment industry. The Entertainment Industry Plans consist of several trust funds established pursuant to Section 302(c) of the Labor Management Relations Act of 1949, 29 U.S.C. § 186(c). The contributions to these funds are collected from a very large number of employers. For example, according to records of the Directors Guild Plans, contributions were collected from approximately 1,400 employers in 2000; according to records of the Writers Guild Plans, contributions were collected from approximately 1,000 employers in 2000; and according to records of the SAG Plans, contributions were collected from approximately 2,200 employers in 2000. The intricacies of the collection process are compounded by the facts that (1) contributions are only based on wages for work performed subject to the relevant collective bargaining agreements and (2) the distinctions between work subject to the relevant collective bargaining agreements and work not subject can, at times, involve complex factual inquiries. Because of these circumstances, the Entertainment Industry Plans have a vital interest in the allocation of the burden of production in cases involving unpaid contributions.

Unless the decision below is reversed, it is anticipated that the collection process will become significantly more difficult, with a potentially significant decrease in contribu-

tions. These difficulties may impede the goal of the Entertainment Industry Plans to provide pension and health benefits to those collectively bargained employees who have become entitled to them because of service under their respective collective bargaining agreements.

The Entertainment Industry Plans therefore request this Court to accept the attached brief in support of the petition for certiorari in this case.

Respectfully submitted,

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December 5, 2001

QUESTION PRESENTED

1. Once it has been demonstrated that an employer has violated the record keeping requirements of ERISA section 209, 29 USC § 1059 (2001), does the burden shift to the employer (without any additional showing by the multiemployer plan) to show what work performed by its employees is not covered by the contributions requirements of a collective bargaining agreement?

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BRIEF *AMICI CURIAE* OF THE DIRECTORS GUILD OF AMERICA-PRODUCER PENSION PLANS AND HEALTH PLAN, THE PRODUCER-WRITERS GUILD OF AMERICA PENSION PLAN, THE WRITERS' GUILD-INDUSTRY HEALTH FUND, AND THE SCREEN ACTORS GUILD-PRODUCERS PENSION AND HEALTH PLANS IN SUPPORT OF THE PETITIONER

INTEREST OF *AMICI CURIAE*

The interest of the *amici curiae* is set forth in the motion accompanying this brief.

SUMMARY OF ARGUMENT

While the decision below may initially strike someone unfamiliar with the difficulties in collecting contributions to multiemployer pension and health plans as dealing with a minor procedural issue that arises in the course of collection proceedings, the Ninth Circuit's opinion has the potential to significantly undermine the collection process in a way that may well impair the financial security of multiemployer plans, especially in industries (like the entertainment industry) characterized by a very large number of contributing employers. The dissenting opinion by Judge Harry Pregerson accurately characterizes the majority decision as one that "imposes a difficult burden of production on the Plan Trustees and rewards employers who blatantly violate the record keeping duties imposed by ERISA" (Pet. App. at 10a).

N.T. Audio Visual Supply, Inc. ("N.T. Audio") is required pursuant to certain collective bargaining agreements to make contributions to the Motion Picture Industry Health Plan and the Motion Picture Industry Pension Plan (collectively, the "Plans") (Pet. App. at 2a). Required contributions are based on hours worked or guaranteed under the collective bargaining agreements. (Id.)

Upon audit by the Plans, it was determined that some employees for whom contributions had been made were compensated for more hours of work than had been reported. (Pet. App. at 6a). There were two categories of unreported work with respect to those employees. One category consisted of discrepancies between payroll records, time cards and W-2s and the data reported by N.T. Audio to the Plans, i.e., employer records showed payment for additional hours to these employees, but the hours had not been treated as covered hours by the employer. (Pet. App. at 7a.) The second category consisted of cash payments to these employees that had apparently not been treated as any kind of wages. (Id.)

Understandably suspicious of these unreported hours and unrecorded cash payments, the Plans submitted a discovery request requesting all documents identifying the duties of employees. (Pet. App. at 6a). N.T. Audio stymied this maneuver by responding that it did not have any such documents. (Id.)

Under these circumstances, the Ninth Circuit readily concluded that N.T. Audio had violated ERISA section 209, 29 U.S.C. § 1059, which requires an employer to "maintain records with respect to each of its employees sufficient to determine the benefits due or which may become due to such employees." At this point one might have expected the Ninth Circuit, consistent with its prior precedent in *Brick Masons Pension Trust v. Industrial Fence & Supply, Inc.*, 839 F.2d 1333 (9th Cir.1988), to hold that the burden now shifted to N.T. Audio to come forward with evidence with respect to whether the unreported W-2 amounts and cash contributions were with respect to work performed under the collective bargaining agreement. The Ninth Circuit, however, adopted a different approach, which sets it apart from decisions in other circuits.

The Ninth Circuit held that the Plans had the burden to "produce evidence establishing that those unreported hours corresponded to covered work." (Pet. App. at 6a.) In light of N.T. Audio's failure to produce any information describing the unreported work, the Ninth Circuit held that the Plans had not met their burden and, accordingly, a summary judgment in favor of the Plans was reversed.

As will be described below, the Ninth Circuit's decision creates a conflict with the decisions of several other circuit courts. Resolution of this conflict is especially important because many multiemployer plans collect contributions

from employers throughout the country,[2] so different auditing standards will apply to the same plan, depending on the location of the employer, unless the conflict is resolved.

In addition, the legislative history of ERISA section 209 demonstrates that Congress intended that no limitations be imposed upon the burden-shifting mechanism that applies when a violation of the statute occurs. The Ninth Circuit's decision is in conflict with this conclusion.

Finally, the decision is flawed because of its fundamental misconception of what constitutes adequate evidence to establish that unreported hours correspond to covered work. Especially in the entertainment industry, where determining the extent to which contributions are required involves questions peculiarly within the knowledge of employers, the Ninth Circuit's standard will significantly modify the collection process in a way that potentially undermines the financial security of multiemployer plans.

ARGUMENT

A. The Ninth Circuit's Holding Creates a Conflict with the Sixth and Eleventh Circuits.

As noted above, the Ninth Circuit's opinion began from the premise that N.T. Audio had violated its record keeping obligations under ERISA section 209. The court concluded, however, that that was insufficient to shift the burden of production to the employer with respect to the unaccounted for hours and cash payments to employees on behalf of whom contributions had been made. Contrary case law from other circuits was purportedly distinguished on the ground that these other circuits had required, as a condition of shifting

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[2] For example, collective bargaining agreements under which contributions are required to the Entertainment Industry Plans extend to individuals employed in the entertainment industry throughout the United States.

the burden of production, proof that there existed specific employees for whom the employers had failed to make required contributions.

This purported distinction is not supported by the actual holdings of the two cases from the Eleventh and Sixth Circuits, the two circuits that conflict with the Ninth Circuit. *Combs v. King*, 764 F.2d 818 (11th Cir. 1985), concerned an employer that maintained no records of hours worked by her employees. Instead, contributions to the United Mine Workers of America (UMWA) Pension and Benefit Plans were based on the number of tons of coal hauled. This contribution formula was only permissible under the collective bargaining agreement if it resulted in a contribution higher than that which would have been required if contributions had been paid on hours worked. Thus, actual records of hours worked were required.

In framing the issues before it, the Eleventh Circuit stated:

> "We must first decide whether the employer has a statutory duty under ERISA to maintain adequate records regarding the number of hours worked by its employees. Second if such a duty exists, does an employer, who fails to produce adequate records, assume the burden of disproving the accuracy of the plaintiff's figures regarding the number of hours worked? The third issue we address is whether a district court erred in granting summary judgment." 764 F.2d at 821-22.

The Eleventh Circuit answered all three questions in the affirmative, demonstrating that the failure to maintain adequate records is by itself sufficient to shift the burden of production.

Michigan Laborers' Health Care Fund v. Grimaldi Concrete, Inc., 30 F.3d 692 (6th Cir. 1994), also squarely holds

that the burden shifts upon the demonstration that inadequate records were maintained. The specific holding is contained in the following language:

> "Here, Grimaldi Concrete provided no records at all with respect to 80% of the work performed under the collective bargaining agreement, and provided incomplete records with respect to the remaining 20%. We believe, accordingly, that Grimaldi Concrete failed to maintain adequate records as required by Section 1059. The burden thus shifted to Grimaldi to prove what work was covered and what was not covered." 30 F.3d at 696.

At another point, the court stated:

> "As previously noted, the benefits calculations under the collective bargaining agreement depend on knowledge of the specific number of hours worked by each employee on projects covered under the collective bargaining agreement. Given these calculation constraints and Grimaldi Concrete's violation of its statutory duty, it is impossible to determine with any precision the amount of contributions due to the Funds. We agree with the Ninth Circuit [at the time of the *Grimaldi* decision, the Ninth Circuit had issued an earlier decision in *Brick Masons Pension Trust v. Industrial Fence & Supply, Inc.*, 839 F.2d 1333 (9th Cir.1988) that was consistent with the *Grimaldi* standard] that, under these circumstances, an employer is liable for contributions on all hours worked during a period in which it has been demonstrated that some covered work was performed." 30 F.3d at 697

The *Grimaldi* standard is obviously inconsistent with that now being articulated by the Ninth Circuit. There is no dispute that "some covered work was performed" by N.T. Audio employees during the period in question. This would

lead to a shift in the burden of production under the Sixth Circuit's standard, but not under the Ninth Circuit's.

B. The Ninth Circuit's Holding is Contrary to the Legislative History of ERISA Section 209

The Ninth Circuit's imposition of additional requirements that must be met before an employer's violation of ERISA section 209 leads to a shift in the burden of proof conflicts with the legislative history of Section 209. Section 209 was enacted as part of ERISA in 1974. ERISA imposed, of course, a complex regulatory regime upon pension and welfare plans in order to achieve a number of important Congressional objectives. One of these important objectives was to impose minimum vesting standards upon pension plans. H.R. Rep. No. 93-807, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 4670, 4685-86 summarizes some of the Congressional considerations that went into the imposition of minimum vesting standards.

H.R. Rep. No. 93-807 was the House report on H.R. 12855, one of several bills that were eventually folded into ERISA. H.R. 12855 is significant because it contains the statutory language that, with modifications, became ERISA section 209. Section 1012(a) of H.R. 12855 contained new Internal Revenue Code section 411, imposing minimum vesting standards. Section 411(f)(1) read as follows:

> "(1) SINGLE EMPLOYER PLAN. – Except as provided by paragraph (2), every employer shall, in accordance with regulations prescribed by the secretary or his delegate, maintain records with respect to each of his employees sufficient to determine the benefits due or which may become due to such employees."[3]

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[3] The text of H.R. 12855 is found in Legislative History of the Employee Retirement Income Security Act of 1974, Prepared by the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, April 1976, Volume II p. 2952.

The language of I.R.C. section 411(f) is essentially identical to that of ERISA section 209(a)(1), the first sentence of which reads as follows:

> "Except as provided by paragraph (2) every employer shall, in accordance with regulations prescribed by the secretary, maintain records with respect to each of his employees sufficient to determine the benefits due or which may become due to such employees."

In light of the parallel language, the following language from H.R. 93-807, which explains the effect of I.R.C. section 411(f), is of great significance:

> "The committee expects that the necessary records will be retained by employers for at least 10 years following a break in service. After that, the employee could still establish his right to vesting based on prior service, but the burden of producing the evidence would shift to the employee." H.R. Rep. No. 93-807, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 4670, 4731-32.

This language directly rebuts the Ninth Circuit's interpretation of the consequences of a failure to comply with ERISA section 209. The statement in the House Report that the burden of production shifts to the employee following the completion of 10 years after a break in service obviously stands for the proposition that, prior to the lapse of this time period, the employer bears the burden of production. The House Report does not refer to any required showing by the employee prior to the imposition of this burden on the employer. The House Report thus supports the position of the Sixth and Eleventh Circuits and prior Ninth Circuit authority that the failure to maintain adequate records under ERISA section 209 is the sole precondition to the shift of the burden of production to a noncompliant employer.

C. The unsoundness of the decision below is demonstrated by the severe difficulties it will create for multiemployer plans in performing the duties imposed upon them to collect contributions.

The trustees of multiemployer pension and health plans have a fiduciary obligation to take appropriate steps to collect contributions due from employers. "ERISA clearly assumes that trustees will act to ensure that a plan receives all funds to which it is entitled, so that those funds can be used on behalf of participants and beneficiaries." *Central States, Southeast, and Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 571 (1985). The decision below will increase the costs of discharging these responsibilities and lessen the success of such collection efforts, thus depleting plan assets.

One threshold difficulty simply consists of understanding the standard articulated by the Ninth Circuit. What must a multiemployer plan do in order to shift the burden of proof? At one point the decision refers to the burden of "proving that there existed some employees who (a) performed covered work that was (b) unreported to the Plans." At another point the plaintiff was stated to have failed to "produce evidence establishing that these unreported hours corresponded to covered work." (Pet. App. at 6a.) The situation below was contrasted to other cases, such as *Combs*, where plaintiff "submit[ted] testimony by employees who performed the unreported work." (Id.)

The Ninth Circuit's ruling creates an untenable distinction between direct and indirect evidence. The relevant standard for proving a fact has been described as follows by the Supreme Court:

> "The burden of showing something by a 'preponderance of the evidence,' the most common standard in the civil law, 'simply requires the trier of fact "to believe that the existence of a fact is more probable than

> its nonexistence before [he] may find in favor of the party who has the burden to persuade the [judge] of the fact's existence." ' "

Concrete Pipe and Products of Cal., Inc. v. Construction Laborers Pension Trust for Southern Cal., 508 U.S. 602 (1993).

As previously noted, the Ninth Circuit acknowledged that there was uncontroverted evidence that there existed employees who had performed work subject to the jurisdiction of the collective bargaining agreement who had (1) received additional W-2 wages that had been treated as paid for services not subject to the jurisdiction of the collective bargaining agreement and (2) received cash payments that had not been reported as wages at all. In response to discovery requests, the employer stated it had no records identifying the duties of the employees. Based on these extremely suspicious facts, a trier of fact has been presented with adequate evidence to conclude that it is more probable than not that some payments had been made to employees for covered services that had not been correctly reported. The Ninth Circuit's conclusion that this indirect evidence was inadequate to "prove" or "establish" this proposition leaves multiemployer plans at sea with respect to determining the necessary evidence to shift the burden of proof.

While the Ninth Circuit purported to contrast the evidence in the case before it with that presented in other decisions upholding the shift of the burden of production to the employer, closer examination of these cases reveal that they also relied on indirect evidence. For example, the Ninth Circuit suggested that the employees in *Combs v. King*, 764 F.2d 818, 820 (11th Cir. 1985), provided direct testimony with regard to the number of hours worked by them in each month. (Pet. App. at 7a.) When one examines the actual evidence before the court, it apparently consisted of testimony by employees that they "generally" worked at least

eight hours a day and that it would have been "impossible" for them to have worked the same hours each month. The court treated these general statements as significant because the reports to the multiemployer plans by the employer in *Combs v. King* suspiciously showed exactly the same number of hours worked each month for many months in a row. The *Combs* court thus relied on indirect evidence of general work patterns to support an inference that the submitted hours were incorrect.

The difficulties created by the Ninth Circuit's new standard can be illustrated by describing some of the contribution collections issues that confront the Entertainment Industry Plans. These difficulties are particularly acute because (1) contributions are often based on wages paid, rather than hours worked (i.e., the contributions are a percentage of covered wages), (2) directors, actors, and writers often perform multiple services for the same employer, only some of which are subject to the jurisdiction of the relevant collective bargaining agreement (for example, a director may both produce a commercial and direct the actual shooting of the commercial), and (3) in order to simplify the collection process, the collective bargaining agreements use certain criteria that involve information peculiarly within the knowledge of the employer.

For example, a collective bargaining agreement exists between the Directors Guild of America, Inc. (the "DGA") and the Association of Independent Commercial Producers, Inc. (the "AICP"). For purposes of determining the wages upon which contributions are due to the Directors Guild Plans, the DGA and the AICP have entered into a side letter agreement providing that contributions are based on a "presumed salary." The "presumed salary" is computed by computing the number of "actual shoot days" per calendar year (a shoot day is a day spent actually filming the commercial) and multiplying that number by a dollar factor. For example,

for a commercial shot in July 2000, the presumed salary is $5000 per shoot day.

If the Directors Guild Plans audit such an employer and determine, for example, that a director has been paid $23,000, they lack any information upon which to determine the contributions due. The critical inquiry is how many "shoot days" underlay the check for $23,000. If the employer, like the employer in *N.T. Audio*, asserts that it lacks any underlying records to determine the shoot days, the Plans lack any basis for determining the appropriate amount of presumed salary and, according to the Ninth Circuit, have failed to shift the burden of proof to the employer. This problem is particularly exacerbated by the fact that commercial directors work almost exclusively on a free-lance basis. Their employment shifts from director to director, depending upon the availability of work. Thus, at the time of the audit, the relevant director is probably not working for the employer being audited, increasing the difficulty of locating him.

The SAG Commercial Agreement contains a requirement that services by covered members be allocated between acting and nonacting services. SAG Commercial Agreement, § 45. For example, a celebrity may sign a contract with an advertising agency in order to promote a particular product, perhaps an automobile. As part of the contract, the celebrity will agree to act in commercials for the product, drive the product, attend events in which the product is promoted, and not to use a competing product. Only the acting services are covered services under the SAG Commercial Agreement. Absent adequate record keeping by the employer, the SAG Plans are completely precluded from making an appropriate allocation of the services between covered and noncovered categories. Yet, according to the Ninth Circuit, the employer is free to ignore its statutory record keeping obligation and still escape a shift in the burden of proof. This is so because

it will be extremely difficult, if not impossible, for the SAG Plans to "establish" the initial step demanded by the Ninth Circuit of showing that some employees performed covered work that was not reported.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari and review the decision below.

Respectfully submitted,

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Respondent respectfully submits this Corporate Disclosure Statement.

Respondent N.T. Audio Visual Supply, Inc. is a privately held corporation. It has no parent corporation and no publically held company owns 10% or more of the corporate stock.

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BRIEF IN OPPOSITION

Respondent N.T. Audio Visual Supply, Inc. respectfully requests the petition for writ of certiorari sought in this matter be denied.

REASONS FOR DENYING THE WRIT

The petition comes before this Court not because of any new or conflicting statement of law having broad impact, but because of Petitioners' failure to develop sufficient evidence before filing their motion for summary judgment in the district court. The Ninth Circuit merely applied long held ERISA standards to the unusually meager facts Petitioners presented in support of liability, found them wanting, and reversed the grant of summary judgment.

Petitioners now predicate their request for review on three assertions, all of which are in error, and none of which are supported by their authorities, nor by the record.

First, Petitioners seek review of a holding that was not made. The Ninth Circuit did not hold, as Petitioners contend, that benefit plans have the burden of proving contributions are due "even when the failure of an employer to comply with its statutory duty to maintain records will make it impossible or impracticable for the plan to meet this burden." (Pet. at 2.) There was no issue raised below concerning the impossibility or impracticability of proving contributions were due, and none was considered in the decision. Rather, the Ninth Circuit held

that the Petitioners had failed to produce sufficient evidence to meet their threshold burden of proving that there had been some covered work performed for which benefits were not properly paid. (Pet. App. at 6a.)

Second, contrary to Petitioners' contention, the Ninth Circuit's holding in this case does not conflict with its previous holdings, nor with those of other circuits. It is in harmony with this Court's decision in *Anderson* and related ERISA cases. The applicable standards in those cases are clear. Employee benefit plans have the initial burden of proving there has been some covered work performed for which benefits were not properly paid. If the plans thus establish liability (the "fact of damage"), they may proceed to prove the extent of benefits due (the "amount of damage"). If the plans then demonstrate the employer's records are inadequate to allow the calculation of damages, the burden shifts to the employer to disprove damages, in whole or in part.

The "fact of damage" was not in dispute in any of the cases which Petitioners claim support their position. It was undisputed there had been some covered work for which benefits had not been paid. The issue was simply the amount of damages.

The record below, however, presented the Ninth Circuit with a different and unique set of facts. By their own admission, Petitioners could not prove the fact of damage. Unlike the plans and trusts in the authorities they cite, Petitioners obtained no employee affidavits, generated no favorable deposition testimony, secured no written stipulations and, rather than present testimony at trial, opted to proceed by summary judgment. Their

motion rested upon the declarations of their auditors who conceded they could only "presume" there was some covered work for which benefits were not paid. They had no substantial evidence to prove it.

Given that evidentiary void, the plans sought a new standard for ERISA cases. They argued that if the plans, as the moving party on a motion for summary judgment, simply "raise genuine questions" about the accuracy of the employer's records, that alone should cause the burden to shift to the employer to prove the absence of liability and the absence of damage. (Pet. at 6.) In short, they wish to skip that niggling first step, proving liability, and proceed directly to the second step, raising issues about damages. They seek this new and relaxed standard even where, as here, the failure to prove liability resulted either from the plans' own failure to investigate, or because there was, in fact, no breach of the collective bargaining agreement. Not only was the Ninth Circuit's holding correct, but Petitioners have offered nothing to suggest any other court would decide these facts differently.

Finally, while a court could at some time issue a decision which might properly generate the concerns for financial solvency of employee benefit plans expressed by the petition, this is surely not that decision. The court below simply declined to eviscerate the modest "fact of damage" standard of proof required of the Petitioners. There is no reason to believe the decision will somehow threaten the financial vitality of employee benefit plans.

ARGUMENT

I. NEITHER THE RECORD NOR THE DECISION BELOW RAISE THE QUESTION PRESENTED BY THE PETITION

On May 13, 1997, the Plans filed suit against N.T. Audio to recover employee benefits claimed due. The Plans asserted that for some eighteen different persons they claimed to be employees of N.T. Audio during the applicable audit period, N.T. Audio failed to pay some benefits.

The record is devoid of any evidence that the Plans, either before or after filing suit, interviewed or sought affidavits from those employees. After filing suit, they did not notice the deposition of any employee or other witness. There were three employee depositions noticed, all by N.T. Audio. In each, the deponent testified either that he did not perform any covered work for N.T. Audio during the audit period, or that to the extent he had, benefits had been fully reported and paid.

There was no evidence that any of the eighteen purported employees performed any covered work during the audit period for which benefits were improperly paid. Nonetheless, on December 15, 1997, the Petitioners plunged ahead with a motion for summary judgment. The motion was granted. This appeal followed.

On appeal, and unable to prove the fact of damage (Pet.App. at 7a), Petitioners argued that if they merely proved the Respondent's records were deficient, the burden then shifted to the Respondent to disprove not only damages, but liability itself. They claimed it was enough,

as the moving party on summary judgment, to "raise genuine issues" about the accuracy of the employer's records. (Pet. at 6.)

The best statement of the actual issue before the Ninth Circuit was its own.

> We must decide, in an action under the Employment Retirement Income Security Act ("ERISA"), whether trustees of employee benefit plans produced sufficient evidence of employer liability on summary judgment to shift the burden of production. (Pet. App. at 1a.)

Looking to *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946) and *Brick Masons Pension Trust v. Industrial Fence & Supply, Inc.*, 839 F.2d 1333 (9th Cir. 1988), the Ninth Circuit said "once the Trustees show 1) that N.T. Audio failed to keep adequate records, and 2) that there exist some employees who (a) performed covered work that was (b) unreported to the trust funds, then the burden shifts to the (*sic*) N.T. Audio to show the extent of the unreported covered work for those employees." (Pet. App. at 5a.) Although the Ninth Circuit found the records inadequate (Pet. App. at 5a), it determined that because Petitioners failed to submit supporting employee testimony, and because their auditors appeared only to "presume," without any basis, payments made were for covered work, Petitioners failed to prove 2(a) and 2(b), "the fact of damage." (Pet. App. at 6a-7a.) The court reversed the summary judgment in favor of the Petitioners.

Notwithstanding the facts, issue and holding below, Petitioners find the question presented by this case to be whether employee benefit plans retain the burden of

proving employer contributions are due, even where the employer's deficient records make it impossible or impracticable to do so. (Pet. at (i).) There is nothing in the record, though, to support a claim it was impossible or impracticable to prove the fact of damage. Although Petitioners did argue below that the fact of damage could not be determined on the employer records alone, they never asserted, and have been cautious not to do so here, that it was impossible or impracticable to obtain such proof in this case. Having eschewed routine investigation and discovery, Petitioners can proffer no evidence of what was impossible or impracticable.

The question presented by this Petition was neither raised nor addressed below. It cannot be addressed upon this record, nor upon the decision in this case.

II. THE DECISION BELOW IS CONSISTENT WITH ALL PRIOR CIRCUIT COURT DECISIONS AND WITH THE DECISIONS OF THIS COURT

Petitioners must assert a basis for the grant of certiorari. Petitioners chose "conflict in the circuits." They should have selected more carefully.

The Ninth Circuit applied well established law to a different set of facts not before explored by the very authorities upon which the Petitioners rely. Petitioners, however, misinterpret those authorities, beginning with the decision by this Court in *Anderson*, and extending to *Brick Masons*. Petitioners erroneously say that "[i]n *Anderson* this Court held that where an employee *contends* that he or she was not properly compensated" under the Fair Labor Standards Act ("FLSA"), and the employer fails to

keep proper records, the burden shifts to the employer to proffer evidence of the amount of work performed. (Pet. at 7.) (Emphasis added.)

It has never been sufficient for the employee to merely "contend" he was improperly compensated. He must prove it. *Anderson* made this clear.

> [W]e hold that an employee has carried out his burden if he *proves that he has in fact performed work for which he was improperly compensated* and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. *Id.* at 687-688.[1] (Emphasis added.)

This misunderstanding of the Petitioners' initial burden permeates and poisons their analyses of all other authorities. Some forty years after *Anderson*, the Eleventh Circuit applied the reasoning of that FLSA case in an ERISA context in *Combs v. King*, 764 F.2d 818 (11th Cir. 1985). However, contrary to Petitioners' assertion, *Combs* does not, without more, stand for the proposition that "once a plan audit *raised a reasonable inference* that work

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[1] There is a discrepancy between the last lines of the quotation here, and what purports to be the same quotation in the Petition. (Pet. at 7.) The explanation is that Petitioners' quotation added, deleted, and modified three different words from the original. Those errors, however, are non-substantive and were obviously unintentional.

had been performed on which contributions were due to the plans," the burden shifted to the employer respecting the amount of work in question. (Pet. at 8.) (Emphasis added.)[2] Instead, *Combs* quotes and adopts the language of *Anderson* which precludes any burden-shifting until the employee " 'proves that he has in fact performed work for which he was improperly compensated. . . . ' " *Combs, supra,* at 826, citing *Anderson, supra,* at 687.

That precise language, requiring the Petitioners to first prove the fact of damage, was adopted and repeated as the standard by the Ninth Circuit in *Brick Masons. Brick Masons,* one of the cases Petitioners wish this Court to follow (Pet. at 8), itself made clear that where the evidence is insufficient to prove the fact of damage in the first instance, there can be no burden-shifting on the issue of damages. An employer's records notwithstanding, plans must prove liability.

> [O]nce the Trust Funds proved the fact of damage and [the employer's] failure to keep adequate records, the burden shifted to [the employer] to come forward with evidence of the extent of covered work performed by the . . . employees. *Brick Masons, supra,* at 1338-1339.

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[2] Petitioners' statement of the holding in *Combs* was actually part of an interpretation of *Combs* by *Brick Masons,* 839 F.2d at 1338. But even with that clarification, the statement is erroneous. *Brick Masons* never said the plans need only "raise a reasonable inference." It said they must "produce evidence raising genuine questions." *Id.* at 1338. And, of course, those questions have relevance only after the plans have proven the fact of damage. *Id.* at 1338-1339.

Where *Brick Masons* found that some of the evidence of covered work was too speculative, it disallowed any burden-shifting.

> This testimony fails to establish even the *fact* of damage; the Trust Funds are therefore not helped by the relaxed standard of proof in *Combs* and *Anderson*, which applies only to the proof of the *amount* of damage. *Id.* at 1339 n.4. (Emphasis in the original.)

The decision below, therefore, is in harmony with *Brick Masons*. As did *Brick Masons* with regard to some of the employee claims before it, the court here determined the Petitioners had not offered sufficient evidence to establish the fact of damage. Petitioners were not helped by the relaxed standard of proof respecting the amount of damages. (Pet. App. at 7a-8a.)

In a subsequent Ninth Circuit decision, *Operating Engineers Pension Trust v. B&E Backhoe*, 911 F.2d 1347 (9th Cir. 1990), certain trusts argued, not unlike the Petitioners here, that solely because the employer failed to keep records detailing all duties performed by the employees, and specifically because the employer failed to note when an employee did covered or uncovered work, the employer should be required to make contributions for all work performed. The court found this argument to be "based upon faulty logic and a flawed reading of *Brick Masons* . . . . " *Id.* at 1354. As acknowledged by the petition, the court then followed the *Brick Masons* analysis. (Pet. at 8.)

Petitioners contend *Michigan Laborers' Health Care Fund v. Grimaldi Concrete*, 30 F.3d 692 (6th Cir. 1994), is in conflict with the decision below. It is not. It, too, relies

upon the *Anderson, Combs, Brick Masons* and *Operating Engineers* continuum, applying burden-shifting on the issue of damages only after liability has been established. As with those cases, liability in *Grimaldi* was "certain" and no extensive analysis of it was required. The court recognized that "[i]n *Anderson*, the Supreme Court also emphasized that the *fact* of damage was certain, as in the present case. . . . " *Id.* at 697. (Emphasis in the original.)

In *Illinois Conference of Teamsters and Employers Welfare Fund v. Steve Gilbert Trucking*, 71 F.3d 1361 (7th Cir. 1995), after the burden shifted, an employer was able to blunt summary judgment on the issue of damages by use of affidavits and depositions raising triable issues of fact as to the amount of damages. *Id.* at 1367. Petitioners criticize the holding because it allowed an employer who failed to maintain adequate records to contend that contributions were not due. (Pet. at 9-10.) Those issues, of course, are unrelated to the issues here.

Steve Gilbert Trucking is relevant, though, in that it shows the Seventh Circuit is in lockstep with all other circuits in requiring trusts to first prove liability and deficient records before allowing any burden-shifting.

> *Brick Masons* and *Combs* held that if a trust fund has proved that the employer is liable for delinquent contributions and that the employer has failed to keep adequate records, the burden shifts to the employer to come forward with evidence that the fund's calculations of damages are not accurate. *Id.* at 1367.

All circuits weighing in on the showing required for shifting the burden of proof have used the same *Anderson*

standard in their analysis.[3] In each case, the court deemed the records to be insufficient. Yet, in each instance, the plaintiff, whether plans, or trusts, or employees, had no difficulty proving the fact of damage. *See, Anderson,* 328 U.S. at 687-688, 691-692 (work was performed for which employees had not been compensated); *Combs,* 764 F.2d at 819-820 (the fact of damage was certain); *Brick Masons,* 839 F.2d at 1338 (the fact of damage was certain); *Operating Engineers,* 911 F.2d at 1349-1350 (the fact of damage was certain); *Grimaldi,* 30 F.3d at 694 (parties stipulated the employees did some covered work and it was undisputed the employer made no contributions for it; the fact of damage was certain); *Steve Gilbert Trucking,* 71 F.3d at 1363-1364 (employees performed covered work, but the employer refused to make contribution payments; the fact of damage was certain). Moreover, that same standard for burden-shifting first annunciated in *Anderson* maintains its vibrancy not only in ERISA cases, but in FLSA cases as well. *See,* e.g., *Caro-Galvan v. Curtis Richardson, Inc.,* 993 F.2d 1500, 1514 (11th Cir. 1993); *Fegley v. Higgins,* 19 F.3d 1126, 1133 (6th Cir. 1994).

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[3] Petitioners find solace in *Stanton v. Larry Fowler Trucking,* 52 F.3d 723 (8th Cir. 1995). (Pet. at 9.) The case is inapposite. *Stanton* merely addresses the employer's record keeping requirements under the Consolidated Omnibus Budget Reconciliation Act and the penalty to be suffered if not maintained. It does not address the standard for burden-shifting in issue here.

There is no conflict between this decision and those of the other named circuits. None ever confronted a similar issue respecting the sufficiency of evidence to establish the fact of damage. Rather than having broad application, therefore, this decision will be limited to its facts. Benefit plans in the future will, as they have in the past, enlist the aid of employees and other witnesses to discover and present evidence supporting liability, where liability exists. The multiemployer employee benefit plans, therefore, even those national in scope, will not, as Petitioners argue, be made to operate under conflicting rules of law.

III. THE DECISION BELOW DOES NOT IMPOSE ANY NEW OR MORE COSTLY BURDEN UPON EMPLOYEE BENEFIT PLANS

A. This Decision Will Not Render Plans Unable to Prove Contributions Are Due

Petitioners have failed to demonstrate the Ninth Circuit created a new or more arduous standard for measuring the sufficiency of evidence in ERISA contribution claims on summary judgment. All the shouting and wailing aside, neither common experience nor the underlying facts of this case support the claim that proving the fact of damage could become "impossible or impracticable" because of this decision.

Petitioners can only raise the point hypothetically. They do not claim that in this particular case it was impossible or impracticable to prove liability. As a result, it is unlikely on the record this Court could reach either the substantive or policy issues raised. This case could

not be ripe for decision, if at all, unless upon remand Petitioners establish a record demonstrating the purported impossibility or impracticability of which they complain.

B. This Decision Will Not Cause Plans to Undertake Otherwise Unnecessary Litigation

Petitioners apparently now recognize meeting their burden of proof might require communications with the employees themselves. They say: "In the absence of records, that inquiry will likely involve interviews with employees and other employer personnel and, in some cases, preparing employee affidavits." (Pet. at 13-14.) It just might. In fact, it has. Audits and interviews have been the accepted method of proving the fact of damage in ERISA cases since *Combs* in 1985. No authority cited by Petitioners, however, and none known to Respondent, has held that such interviews and affidavits impose an undue burden upon the plans. So the Petitioners go further.

They argue that even where the requisite evidence can be obtained to prove the fact of damage, "the plan's claim can apparently be refuted by contrary – albeit undocumented – employer contentions," citing to "the Seventh Circuit's *Steve Gilbert* formulation." (Pet. at 14.) Even in the Seventh Circuit, that statement is only partly accurate. But here, *Steve Gilbert* and its progeny are strawmen. They have no relevance to this case. The *Steve Gilbert Trucking* holding related to the quantum of evidence necessary after the burden shifts on summary judgment. *Id.* at 1367. Though Respondent argued the *Steve*

Gilbert position below with respect to damages, it was never addressed by the court. Nor has that "formulation" been adopted by any other case in the Ninth Circuit. The holding is not relevant to any issue decided in this case and provides no support for review by this Court.

C. This Decision Will Not Precipitate Employer Abuses

Petitioners explain that if employers make no contributions, plan assets and employee accounts will be reduced. (Pet. at 15.) While the statement is mathematically unassailable, it does not explain how this case will discourage contributions, nor why this Court should accept this case for review. This decision provides no cover to employers who might intentionally seek to avoid their contractual and statutory obligations to employees. The severe financial penalties imposed by ERISA will continue to dissuade any clear-thinking employer from violating its mandates.

Whether before or after this decision, the relatively few employers who would consciously abuse their obligations to employees subject themselves, in addition to their own attorney fees and costs, to the payment of all unpaid contributions for covered work (and perhaps for uncovered work, too, if the employer cannot prove otherwise), prejudgment interest, an additional sum in an amount equal to the interest due, or the liquidated damages provided under the plan, whichever is greater, the

plan's attorney fees, the plan's audit and other costs, and other legal and equitable relief as the court deems appropriate. 29 U.S.C. § 1132(g)(2); *see Gould v. Lambert Excavating, Inc.*, 870 F.2d 1214, 1217 (7th Cir. 1989) (injunctive relief to compel employer compliance with contribution obligations); *Combs v. Ryan's Coal Co.*, 785 F.2d 970, 981-982 (11th Cir. 1986), *cert. denied*, 479 U.S. 853 (jail terms appropriate for contempt by corporate officers of the employer for wilful violation of an injunction).

There is no reason to believe this decision will somehow tempt employers to cease keeping records. Employee assistance in proving unpaid benefits has in the past been easily garnered. The employer is at risk in the absence of good records. If the employer cannot distinguish covered from uncovered work, the employer suffers by having to pay benefits for all time worked by the employee. All the cited ERISA cases, including this one, stand as warnings to employers that the failure to maintain adequate records and make timely contributions exposes them to extraordinary costs, fees and penalties, as well as to the payment of additional benefits which, but for the inadequacy of records, might otherwise not be required.

CONCLUSION

For all the stated reasons, the petition for writ of certiorari should be denied.

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No. 01-678

IN THE

Supreme Court of the United States

MOTION PICTURE INDUSTRY PENSION AND HEALTH PLANS,
Petitioner,

v.

N.T. AUDIO VISUAL SUPPLY, INC.
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

No. 01-678

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Respondent's brief in opposition to the petition for certiorari clearly describes the approach taken by the Ninth Circuit in the case below. In doing so, that brief also illustrates the sharp difference between the decision below, on the one hand, and on the other hand, the approach dictated by statute, by the decision of this Court in *Central States, Southeast and Southwest Areas Pension Fund v. Central Transport*, 472 U.S. 559 (1985), and by the decisions of other circuits.

As accurately described by Respondent's brief, the Ninth Circuit now holds that employee benefit plans have the burden of showing whether employees performed work requiring contributions to a multi-employer benefit plan, despite the failure of the employer to comply with the ERISA-mandated obligation to maintain such records.

Contrary to the assertions of Respondent and the conclusion reached in the decision below, ERISA requires that an employer maintain records of the work of *all* employees, such that plans can determine *from those records* whether contributions were required. Based on that obligation, this Court, the Ninth Circuit in its *Brick Masons* decision, and other circuit courts have concluded that the failure to maintain such records entitles a plan to conclude that all employee work during the period of time in question is subject to contributions.

ERISA REQUIRES EMPLOYERS TO MAINTAIN RECORDS WITH RESPECT TO ALL EMPLOYEES, AND ENTITLES AN EMPLOYEE BENEFIT PLAN TO CONCLUDE THAT CONTRIBUTIONS ARE DUE WITH REGARD TO ALL EMPLOYEES IF SUCH RECORDS ARE NOT MAINTAINED

The most telling part of Respondent's brief is its failure to address the statute upon which this entire issue is based: ERISA section 209(a)(1), 29 U.S.C. §1059(a)(1). That statute requires every employer to keep records with respect to "*each of his employees* sufficient to determine the benefits due or which may become due to such employees." (emphasis added).

This omission from Respondent's brief could not have been accidental. Reference to the statute makes it very clear that the decision below—and Respondent's argument here—departs from the statute and from previous case law. An employer is statutorily required to maintain records with regard to *all* of its employees, not just those whom the employer asserts are subject to contributions. The reason for this requirement is to permit employee benefit plans to determine, through an audit of those records, whether contributions have been properly made. The failure of an

employer to maintain such records permits the plans to conclude that contributions are due with regard to all employees.

The heart of Respondent's argument is that employee benefit plans must show "the fact of damage," i.e., that a particular employee performed "covered" work requiring contributions to the plan. Unless the plan can demonstrate that an employee did such work, Respondent claims that the plan is not entitled to presume that the work performed by that employee was covered work.

This assertion will negate, or at least substantially undermine, the employer's ERISA mandated obligation to maintain records with regard to *all* employees, *whether or not they are participants in the plan.* By keeping such records, the plan can determine, by auditing company records, whether contributions were made with regard to all covered work. If an employer only needs to keep records with regard to those employees who the employer maintains are participants in the plans, an audit of employer records will be unable to uncover delinquencies. As Respondent admits, (Respondent's Brief in Opposition, pp. 13-14), the auditors will indeed have to go outside of employer records to discover such omissions.

Multi-employer plans most commonly exist in freelance industries such as the entertainment and construction industries. In those industries, the very fact that employees work for many different employers make such plans the only realistic way to deliver pension and health benefits. In such industries, the employees who are subject to a plan audit often will no longer be working for that employer or even in the industry. In addition, such employees will often be looking for work from the very employers who are denying coverage. If the decision below is permitted to stand, plans will bear the burden of determining the identity of the employees for whom contributions might be owed, locating

every single employee, wherever they might be, to determine whether or not they performed covered work, and then persuading these employees that they should give evidence against employers with whom they may be seeking work. Since plans commonly audit over a four year period, this could involve interviewing hundreds, if not thousands of employees for whom contributions were not made to determine whether they engaged in covered work.

This issue is at the very core of this Court's *Central States* decision. In that case, an employer objected to a plan audit because the employer asserted that 60% of its employees were not plan participants. *Central States*, 472 U.S. at 563. The Court upheld the right of an employee benefit plan to audit *all* employee records, including those for employees the employer claimed were not plan participants. As the Court explained, the audit was necessary to further the plan's duty to determine "who is in fact a plan participant" and to "prevent participant employers from gaining even temporary use of assets to which the plan is entitled." 472 U.S. at 572.

The decision below would completely eviscerate the Court's holding in *Central States*. While a plan would continue to have the right to audit all of the employer's records, that audit right would often become meaningless since the employer would not have a meaningful obligation to maintain the records which the plan would need for its audit. If the employer failed to maintain adequate records, the plan would have no effective remedy. The plan would have to go outside of the employer's records to determine whether contributions were due. As noted above, and in the briefs previously filed by Petitioner and *Amici Curiae*, this will often be impossible or impracticable.

The Sixth Circuit in *Michigan Laborers Health Care Fund v. Grimaldi Concrete*, 30 F.3d 692 (6th Cir. 1994) squarely addressed this issue. In that case, employees of the construction firm engaged in both covered and non-covered

work under the agreement. The employer failed to keep records for over 80% of its workforce, and the records it kept for the other 20% were incomplete. Thus, there was no way for the plan to determine what work was covered and what work was not covered. The Sixth Circuit held that because the employer failed to keep adequate records, "the burden shifted to [the employer] to prove what work was covered and what was not covered." 30 F.3d at 696.

Although Respondent refers to certain language in other circuit court decisions from which Respondent asserts that those courts would require the plan to demonstrate "the fact of damage" as described by Respondent, a review of those decisions demonstrates that these courts did not address this issue. Suffice it to say that even if these decisions could be considered to substantiate Respondent's position, they are contrary to the statute, this Court's decision in *Central States*, and the policy considerations underlying both. In addition, if consistent with the decision below, they illustrate further the need to clarify the law, since they would be directly contrary to the Sixth Circuit's *Grimaldi* decision.

CONCLUSION

This case raises an important question of statutory interpretation. Do employee benefit plans, in fulfilling their duty to preserve plan assets, have a right to rely on an employer's statutory obligation to maintain records for their employees? Or, do employee benefit plans have the burden of demonstrating that an employee performed some covered work even where an employer failed to keep records from which the nature of the employee's work can be determined?

If left standing, the Ninth Circuit's decision below will substantially undermine the statutory obligation to maintain records and will erect substantial and unnecessary barriers to benefit plan audits.

This Court should grant this Petition in order to ensure that its landmark decision in *Central States* is not undermined, and so that the financial integrity of employee benefit plans is not eroded.

Respectfully submitted,

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Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS IN SUPPORT OF PETITIONER

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IN THE

Supreme Court of the United States

No. 01-678

MOTION PICTURE INDUSTRY PENSION AND HEALTH PLANS,
Petitioner,

v.

N.T. AUDIO VISUAL SUPPLY, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS IN SUPPORT OF PETITIONER

INTEREST OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS

The National Coordinating Committee for Multiemployer Plans ("NCCMP") is a nonprofit, tax-exempt organization that has participated for over a quarter of a century in the development of the law applicable to employee benefit plans.[1] Some 240 multiemployer plans and related

[1] Pursuant to Rule 37.6 of the Rules of this Court, the undersigned hereby state that no counsel for Petitioner or Respondent authored any part of this brief. Moreover, no person or entity other than the NCCMP made a monetary contribution to the preparation or submission of this brief.

international unions, with a nationwide participant base, are affiliated with the NCCMP. The NCCMP is the only national organization devoted exclusively to protecting the interests of multiemployer plans by advocating on behalf of these plans in Congress, in the courts and in the regulatory process.

The NCCMP was recognized by Senate cosponsors as having had a significant impact on the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), PUB. L. NO. 96-364, 94 STAT. 1208.[2] That Act amended the Employee Retirement Income Security Act of 1974 (ERISA), 88 STAT. 829, 29 U.S.C. § 1001, *et seq.*, so as to improve substantially the recourse of multiemployer plan trustees against employers who fail to fulfill their obligation to make promised contributions. Congress recognized that the financial soundness and stability of multiemployer plans was being undermined by employer delinquencies, to the direct detriment of the plans, the participants and beneficiaries, and those employers that honored their contribution obligations.

The decision below concerns the nature and extent of the trustees' burden of proof in an action under the MPPAA to collect contributions from a participating employer that has failed to keep records sufficient to establish what contributions are owed. Several decisions have placed the onus of such inadequate recordkeeping on the employer, by shifting the burden of proof to the employer to come forward with evidence contradicting the reasonable inference that contributions are due for all work performed. The decision below instead places the burden on the fund trustees to show that the undocumented and unreported work was covered work.

Multiemployer plans provide medical, pension and other coverage for millions of American workers. Multiemployer

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[2] *See* 126 CONG. REC. S9835 (daily ed., July 21, 1980) and S10,100 (daily ed. July 29, 1980).

pension plans alone cover some ten million workers, one-fifth of all American workers with pension plans.[3] Congress has recognized that the continued well-being and security of these employees, retirees and their dependents are directly impacted by multiemployer plans and that problems such as employer delinquencies which tend to discourage the maintenance and growth of such plans are contrary to the national public interest. 29 U.S.C. §§ 1001(a)(1), (3) and (c)(2).

The decision below, if allowed to stand, will significantly detract from the ability of plan trustees to enforce the contribution obligations of uncooperative employers, by placing the burden of inadequate recordkeeping directly on the plans.

By law, it is the employer that is obligated to maintain and to make available to plan fiduciaries records from which its contribution obligations can be determined. Without the benefit of the sensible burden-shifting mechanism recognized in other cases, the cost, difficulty and uncertainties of collection actions will likely deter trustees from suing employers who have violated their recordkeeping obligations, to the detriment of the NCCMP's constituent funds, participants and beneficiaries.

The evasion by some employers of their contribution obligations constitutes a persistent and serious problem for multiemployer plans. The plan trustees labor under an obligation to attempt to monitor employer compliance, a task made particularly burdensome when employers fail to keep the required records. The actuarial soundness of multiemployer plans can be directly and adversely affected when employers successfully evade their contribution

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[3] *See* Harriet Weinstein and William J. Wiatrowski, *Multiemployer Pension Plans, Compensation and Working Conditions*, 23 (Spring 1999).

obligations by underreporting hours. Moreover, the ability of participants and beneficiaries to claim and receive the full amount of benefits to which they are entitled will be seriously undermined if employers are to be effectively rewarded for failing to maintain documentation of covered work.

Accordingly, the NCCMP and its constituent groups have a strong interest in supporting the granting of the petition herein and in urging the reversal of the decision below, to ensure that multiemployer plans continue to have an effective remedy against employers whose inadequate recordkeeping renders it difficult to identify and quantify delinquencies to the plans. Both Petitioner and Respondent have consented to the filing of this brief, as is evidenced by letters of consent that have been filed with the Court.

INTRODUCTION

The NCCMP submits this brief *amicus curiae* to urge the Court to review the decision below, which penalizes multiemployer plans for the recordkeeping violations of individual employers.

SUMMARY OF REASONS FOR REVIEW

Multiemployer plans serve a unique and valuable role in our society by providing cost-effective pension and medical coverage for employee groups for whom single employer coverage is not a realistic option. These plans depend for their financial survival upon the timely and accurate submission of contributions by participating employers. Unfortunately, the failure of some employers to report and submit all contributions due is a substantial and persistent problem for multiemployer plans.

The 1980 MPPAA represented a significant step forward by providing multiemployer plans with an effective means of enforcing employer contribution obligations. However, employers that violate their statutory obligation to maintain records verifying the amount of covered employment

performed by their workers post an ongoing obstacle to full enforcement of contribution obligations. The decision below operates to shield such employers from any realistic enforcement mechanism. Thus, ironically, an employer that not only fails to pay required contributions but in addition violates its obligation to keep appropriate records is more likely to escape liability than an employer that merely fails to remit contributions.

By law, the obligation to generate and maintain records of covered employment rests, as it should, with the employer. Yet, the decision below saddles multiemployer plans with the burden of filling any gaps in employers' records, in actions against employers for unpaid, undocumented contributions. Such an approach is flatly inconsistent with the purposes and policies of the MPPAA, with this Court's decision in *Central States, S.E. & S.W. Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559 (1985), and with prior decisions of the lower courts. Moreover, the decision below relies on the erroneous and dangerous proposition that a multiemployer plan is not "injured" by an employer's failure to maintain records adequate to quantify the amount of contributions actually owed.

For all of these reasons, the NCCMP urges this Court to review the decision below.

REASONS FOR REVIEW

I. MULTIEMPLOYER PLANS, THE SOLE SOURCE OF MEDICAL AND PENSION BENEFITS FOR A SIGNIFICANT SEGMENT OF THE AMERICAN PUBLIC, DEPEND FOR THEIR SURVIVAL UPON THE READY ENFORCEABILITY OF EMPLOYER REPORTING AND CONTRIBUTION OBLIGATIONS.

The federal authority to create collectively bargained, jointly trusteed fringe benefit plans has long existed in Section 302(c)(5) of the Labor-Management Relations Act of

1947, 29 U.S.C. § 186(c)(5). Fifty-four years following the passage of Section 302, collectively bargained multiemployer plans have become a mainstay of health and retirement protection for employees in a variety of industries in this country. Such plans recognize covered employment with any participating employer for purposes of determining an employee's entitlement to benefits. Some ten million employees in this country participate in multiemployer plans. *See* Weinstein and Wiatrowski, *supra*, at 21.[4]

Multiemployer plans fill a particularly important need in industries characterized by irregular employment or frequent shifts of workers between employers, such as construction and trucking. *See* David M. Strauss, Executive Director of the Pension Benefits Guaranty Corporation, Remarks at the Meeting of the National Coordinating Committee for Multiemployer Plans (Dec. 4, 1997), *at* http://www.pbgc.gov/news/speeches/NCCM1297.htm [hereinafter "Strauss Remarks"]. They are also a vehicle for providing benefits at an affordable cost in industries dominated by small employers, such as garment manufacturers, restaurants and service establishments. *Id. See generally* Weinstein and Wiatrowski, *supra*, at 20.

In addition to providing workers in such industries with benefit portability, which allows employees to move from employer to employer without penalty, multiemployer plans help protect workers from the potentially devastating consequences of business downsizing, mergers and closings. Multiemployer pension plans continue on even if particular employers go out of business, so that workers who lose their

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[4] In enacting MPPAA, Congress found and declared that "the continued well being and security of millions of employees, retirees and their dependents are directly affected by multiemployer plans. . . ." MPPAA § 3, PUB. L. NO. 96-364, 94 STAT. 1209 (1980) (codified at 29 U.S.C. § 1001a(3).

jobs in such circumstances remain protected in their pension benefits. Strauss Remarks, *supra*. Because of the transitory nature of their employment and/or the small size of their employers, many employees would be unable to participate in any employee benefit plan were it not for the existence of multiemployer plans.

The success of this system of coverage directly depends on accurate employer reporting of each employee's hours of covered employment, and on timely payment of contractually established contributions for all hours of such employment. In recognition of this dependency, Congress, in the MPPAA, imposed on employers a *statutory* obligation to make contributions in accordance with the terms of multiemployer plans. MPPAA § 306, PUB. L. NO. 96-364, 94 STAT. 1208 (1980) (codified at 29 U.S.C. § 1145). The intent was to discourage delinquencies and to simplify collection of contributions from defaulting employers. *See Staff of Senate Comm. on Labor and Human Resources*, 96th CONG., 2d SESS. S., 1076, *The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration*, 44 (Comm. Print 1980), *cited in* J. Daniel Plants, Note, *Employer Recapture of ERISA Contributions Made by Mistake: A Federal Common Law Remedy to Prevent Unjust Enrichment*, 89 Mich. L. Rev. 2000, 2036-37 & n. 231 (June 1991). Employer delinquencies, Congress recognized, posed a threat to the financial stability of multiemployer plans.

Trustees of multiemployer plans are heavily dependent on complete and accurate employer reporting in order to determine what benefits are due to participants and what contributions are owed by employers. Large, geographically disbursed funds with thousands of participating employers and hundreds of thousands of participants and beneficiaries are in no position to oversee the reporting of each and every

individual employer.[5] Small plans with only a few hundred participants and a handful of employers simply do not have the resources to verify employer compliance across the board. Typically, employers are required to submit reports to the funds on a monthly basis, specifying the number of hours worked in covered employment by each employee during the preceding month. Such reports are to be accompanied by payment of contributions at a contractually established rate for all covered work.

Many employers live up to their reporting and contribution obligations. Unfortunately, as Congress recognized during consideration of the MPPAA, a significant number do not, creating serious problems for most multiemployer plans. *See* 126 Cong. Rec. H7899 (daily ed. Aug. 26, 1980) (statement of Representative Thompson).[6] Such delinquencies deprive plans of the benefit of investment income, burden them with the costs of detection and collection, detract from the plans' ability to formulate or meet funding standards, and potentially add to the plans' unfunded liability. *Id.* They can also eventually translate into lower benefits for participants as a group and higher contribution rates for all employers. *Id.* Under Department of Labor rules, plans are obliged to award pension credits based on hours worked in covered employment, regardless of whether the employer has remitted the required contributions.[7]

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[5] In *Central States, S.E. & S.W. Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559 (1985), the plaintiff funds served more than 500,000 employees working for over 13,000 employers. 472 U.S. at 561 n.1.

[6] As the trustees argued in *Central States*, *supra* note 5, there exists an incentive for employers to underreport hours, in that underreporting—unless it is detected—reduces the employer's contribution liability. 472 U.S. at 567.

[7] *See* 29 C.F.R. §§ 2530.200b-2(a)(1) and (2) (computation of service required to be credited to participants must include any hour for which

Various provisions of ERISA operate to place a duty on plan trustees to preserve and maintain trust assets and to prevent employers from gaining even temporary use of assets to which a multiemployer plan is entitled. *Central States, S.E. & S.W. Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 570-73 (1985), discussing 29 U.S.C. §§ 1103, 1104 and 1106. The Secretary of Labor has interpreted the duty to prevent employer use of trust assets to include a duty on the part of the plan to verify employer determinations of hours for which contributions are owed. *Central States*, 472 U.S. at 573-74 (citing Prohibited Transaction Exemption 76-1, 41 FED. REG. 12740, 12741 (1976)). Multiemployer plans typically adopt auditing programs whereby employer records are audited either on a random basis or as a result of a particularized concern regarding a specific employer's performance of its reporting and contribution obligations. The Supreme Court has recognized such auditing programs as a significant means by which plan trustees can satisfy the obligation to monitor employer compliance. *Central States*, 472 U.S. at 574.

The decision below, if not reversed, will erode the efficacy of trustee auditing programs and will seriously interfere with the ability of multiemployer plans to protect themselves against the persistent problem of employer delinquencies. It will become all too easy for employers to evade their contribution obligations simply by failing to maintain statutorily required records. Ironically, the decision below may reward the worst offenders, because an audit can detect and quantify the delinquencies of those employers that honor their recordkeeping obligations.

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employee is directly or indirectly paid or entitled to payment); Dep't of Labor Advisory Opinion 76-89, issued August 31, 1976 (stating that credit must be given solely on basis of service performed for contributing employer, regardless of whether employer has made or defaulted on required contributions).

By granting this petition, the Court can act to ensure that the important accomplishments of the MPPAA in helping multiemployer plans to maintain financial self-sufficiency[8] will not be undermined.

II. THE PRIMARY OBLIGATION TO MAINTAIN AND PRODUCE RECORDS DOCUMENTING COVERED EMPLOYMENT RESTS WITH THE EMPLOYER, BUT THE ENFORCEABILITY OF THAT OBLIGATION UNDER THE MPPAA IS UNDERMINED BY THE DECISION BELOW.

Although plan trustees have an obligation to monitor employer compliance, through audits or otherwise, the primary duty to maintain records documenting and establishing the amount of covered work performed by each employee remains with the employer. Section 209 of ERISA requires an employer to "maintain records with respect to each of his employees sufficient to determine the benefits due or which may become due to such employees." 29 U.S.C. § 1059(a)(1). The same provision requires employers to furnish to plan administrators information sufficient to allow plans to make reports to employees that, *inter alia*, inform them of their accrued benefits. This Court has noted that Section 209 "requir[es] employers to maintain records on employees and to furnish to benefit plans the information needed for the plans' fulfillment of their reporting duties." *Central States*, 472 U.S. at 559-60.

The employer indeed is the only party assured to be in direct possession of the information necessary to establish which employees have performed covered work and how much of such work they have performed. In *Central States*,

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[8] The Executive Director of the Pension Benefit Guaranty Corporation reported in 1997 that in the years since the MPPAA was enacted only 16 plans had required the assistance of the PBGC. (Strauss Remarks.)

this Court specifically rejected the argument that a multiemployer plan had effective alternative means of monitoring employer compliance other than through full access to employer payroll and related records. Neither the interested unions, the Secretary of Labor, nor the employees themselves were deemed appropriate parties to shoulder the burden of monitoring and verifying the accuracy of hours reported by the employer. *Id.* at 461-63.

The MPPAA established a federal statutory cause of action for trustee collection of delinquent contributions, a function previously performed by a variety of actions grounded in state law, based on collective bargaining agreements, or invoking provisions of trust agreements. *See Central States, S.E. & S.W. Areas Pension Fund v. Alco Express Co.*, 522 F. Supp. 919, 922 (E.D. Mich. 1981). In the MPPAA, Congress intended to make it easier for ERISA plans to enforce employer contribution actions without undertaking lengthy, expensive and complex litigation. *See* 126 CONG. REC. S10,102 (daily ed. July 29, 1980) (remarks of Sen. Williams). *See generally* Craig W. Trepanier, Note, *Trading Places: Employer Strategies to Avoid Mandatory Awards of Interest, Liquidated Damages and Attorneys Fees Under the MPPAA*, 78 Minn. L. Rev. 229, 233-35 & n.23 (November 1993). Accordingly, since the enactment of the MPPAA, plan fiduciaries have been able to sue to collect delinquent contributions under Section 502(a)(3)(B)(ii), 29 U.S.C. § 1132(a)(3)(B)(ii), of ERISA.

An action to collect underreported contributions may be accompanied by a claim to compel an audit, or a trustee suit to compel an audit may be filed as a stand-alone action unaccompanied by any claim that contributions are due and owing. *See, e.g., New York State Teamsters Conference Pension and Retirement Fund v. Boening Bros., Inc.*, 92 F.3d 127 (2d Cir. 1996). Thus, the participating employer owes a

duty to a multiemployer plan to produce records sufficient to conduct an audit and a violation of that duty causes an injury to the fund which is actionable under Section 502 of ERISA.

Several courts have given further effect to the record-keeping obligations of participating employers by finding that inadequate recordkeeping can give rise to a presumption that undocumented hours were spent in covered employment.[9] This is the burden-shifting principle rejected by the decision below. The effect of the rule is not to require the employer to pay contributions for undocumented work, but to shift to the employer the burden of establishing that the work in question was not work for which contributions were required to be paid. If the employer—the party best situated to prove the nature of the work—fails to come forward with such proof, then a judgment against the employer for contributions for undocumented work is appropriate. *See, e.g., Michigan Laborers' Health Care Fund v. Grimaldi Concrete, Inc.*, 30 F.3d 692, 697 (7th Cir. 1994).

The burden-shifting principle enunciated in these cases is a direct and logical outgrowth of the employer's recordkeeping obligations under ERISA and of Congress's decision in the MPPAA to provide multiemployer fund trustees with an effective and cost-efficient means of enforcing the contribution obligations of employers. The rule is fair, sensible and fully in accordance with the strong federal policy favoring the maintenance, growth and financial self-

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[9] *See Michigan Laborers' Health Care Fund v. Grimaldi Concrete, Inc.*, 30 F.3d 692 (6th Cir. 1994); *Brick Masons Pension Trust v. Industrial Fence & Supply, Inc.*, 839 F.2d 1333 (9th Cir. 1988); *Combs v. King*, 764 F.2d 818 (11th Cir. 1985). *But see Illinois Conference of Teamsters and Employers Welfare Fund v. Steve Gilbert Trucking*, 71 F.3d 1361 (7th Cir. 1995) (summary judgment in favor of fund reversed because employer's affidavit and deposition testimony raised genuine issue of material fact).

sufficiency of multiemployer plans. The decision below undermines these important policies, warranting review by this Court.

III. THE DECISION BELOW PLACES A BURDEN ON PLAN TRUSTEES THAT IS AT ODDS WITH THIS COURT'S DECISION IN *CENTRAL STATES* AND WITH CONGRESSIONAL INTENT IN THE MPPAA.

The specific point at issue in *Central States* was whether the plan trustees were entitled to audit records of employees claimed by the employer not to be plan participants. The review was requested pursuant to the plaintiff funds' program of periodic audits, and the trustees sought a court order allowing fund auditors to conduct an independent verification of the company's complete payroll records in order to determine whether the duties and status of each of its employees had been accurately reported." 472 U.S. at 563.

The lower court in *Central States* denied the trustees' request, holding in effect that the trustees were required to accept the employer's representations concerning the non-covered status of particular employees unless the trustees had "reasonable cause" to believe that a particular employee had been performing covered work, but had not been so reported. *Central States, S.E. & S.W. Areas Pension Fund v. Central Transport, Inc.*, 698 F.2d 802, 810 (6th Cir. 1983), *rev'd*, 472 U.S. 559 (1985). This Court reversed, holding that the audit program and particular request at issue were fully consistent with the general policies of ERISA as well as with the specific provisions of the statute. *Central States*, 472 U.S. at 574. Thus, the Court rejected the contention that the trustees had to satisfy a threshold burden of "reasonable cause" in order to audit records of employees claimed not to be engaged in covered employment.

The decision below places a burden on plan trustees which is similarly harmful to the financial best interest of the plan and its participants. The trustees initiated an audit of Respondent pursuant to the contractual audit procedure. (Pet. App. 2a.) The audit revealed that Respondent had failed to maintain payroll and employment records sufficient to identify the amount and type of work performed by all of its employees. (Pet. App. 20a.) Based on such information as was made available to them, the plan's auditors concluded that there were over 6000 hours of covered work performed by nineteen employees that had not been reported to the plans.[10] (Pet. App. 21a.) Each of the nineteen employees had performed some covered work for the Respondent employer. *Id.*

In their action to collect delinquent contributions, the trustees filed a motion for summary judgment, seeking contributions for over 6000 unexplained hours identified by the fund's auditors. Respondent opposed the motion, but failed to substantiate its contention that the hours were devoted to non-covered work. In accordance with established precedent in the Ninth Circuit and elsewhere, the District Court granted summary judgment in favor of the funds, since Respondent had failed to satisfy its evidentiary burden. (Pet. App. 15a-23a.)

The Court of Appeals reversed, in a split decision, on the basis that the trustees had failed to establish that any of the unreported hours corresponded to covered work. (Pet. App. 8a.) The majority accordingly placed the burden of Respondent's admitted statutory recordkeeping violation on the funds, even though Respondent was in the best—if, indeed, not the only—position to prove the nature of the

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[10] The existence of some of these unexplained hours was detected through discrepancies between reported hours, on the one hand, and payroll records, timecards and W-2s, on the other. The remainder were revealed by unexplained cash payments to employees. (Pet. App. 7a.)

unreported work. Judge Pregerson, dissenting, noted that the majority had reformulated the burden-shifting scheme applicable in such cases and had placed an untoward burden on multiemployer plans which could well deprive them of recourse against defaulting employers. (Pet. App. 11a, 13a.)

The majority opinion below echoes the decision struck down by this Court in *Central States*. As was the case below, the lower court in *Central States* placed the burden on the plans to come forward with threshold proof of facts which are largely or exclusively in the possession of the employer. In *Central States*, the lower court imposed on the trustees the burden of showing "reasonable cause" to believe that a particular employee was engaged in covered employment, as a condition of granting access to that employee's records. 472 U.S. at 564. In this case, the court below required the trustees to prove that there existed some covered work unreported to the plans, as a condition of enforcing Respondent's contribution obligations. (Pet. App. 6a.) Under the holding of the majority, in order to prevail, trustees must prove the very facts that the employer's recordkeeping violations have successfully concealed.

The decision below places the trustees of multiemployer plans in an impossible position. According to this Court's opinion in *Central States*, trustees labor under an obligation to collect all contributions owed and to attempt to verify the accuracy of employer reporting. In the case of an employer which makes unrecorded cash payments to employees or which fails to keep records relating to work for which contributions are not paid, there is no cost-efficient means by which trustees can even attempt to carry out those obligations, absent the benefit of the burden-shifting principle rejected by the court below.[11] The only remaining alternative

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[11] The court below appears to suggest that the trustees can satisfy their burden by having employees testify that the unreported work was in fact

is for fund trustees to pursue extended, complex and risky litigation in order to determine and prove whether and to what extent contributions are owed.

This was one of the primary problems that the MPPAA was enacted to undo. In Senate floor debate over an early version of the legislation, the following exchange took place:

> Mr. Matsunaga: If the floor manager will yield further, the recourse available to multiemployer pension plans under current law for collecting delinquent contributions is insufficient and unnecessarily cumbersome and costly. May I inquire of the floor manager, does the bill improve the legal recourse available to plans against delinquent employers?
>
> Mr. Williams: Yes, it does. . . . On the whole question of delinquent contributions and the withdrawal liability collection, the bill provides a direct and I suggest unambiguous cause of action under ERISA to a plan against a delinquent employer.
>
> Mr. Matsunaga: If I may pose a further question, in some recent cases . . . , a simple collection action brought by plan trustees, has been converted into lengthy, costly, and complex litigation concerning claims and defenses unrelated to the employer's promise of contributions and the plan's entitlement to the contributions. Would the bill correct this situation?

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covered employment. As Judge Pregerson noted, this assumes that employees will be able to recall the nature and extent of their past work, and it further assumes that employees will be willing to testify against their employers. (Pet. App. 13a.) In *Central States*, this Court specifically rejected a similar suggestion that employees could be expected to come forward to assure that employers are making required contributions. 472 U.S. at 579. Neither the funds nor the employees should have to shoulder this responsibility.

> Mr. Williams: I feel that it would correct the situation. It is essential to the financial health of multiemployer plans that they and their actuaries be able to rely on an employer's contribution promises.

See 126 CONG. REC. S10,102 (daily ed. July 29, 1980).

Similarly, in the House, Representative Frank Thompson explained the purpose of the new federal cause of action as follows:

> Recourse available under current law for collecting delinquent contributions is insufficient and unnecessarily cumbersome and costly. Some simple collection actions brought by plan trustees have been converted into lengthy, costly, and complex litigation concerning claims and defenses unrelated to the employer's promise and the plans' entitlement to the contributions. This should not be the case. Federal pension law must permit trustees of plans to recover delinquent contributions efficaciously, and without regard to issues which might arise under labor-management relations law—other than 29 U.S.C. § 186. Sound national pension policy demands that employers who enter into agreements providing for pension contributions not be permitted to repudiate their pension promises. . . . [T]his legislation is intended to clarify the law . . . by providing a direct, unambiguous ERISA cause of action to a plan against a delinquent employer.
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> * * *
>
> The public policy of this legislation to foster the preservation of the private multiemployer plan system necessitates that provision be made to discourage delinquencies and simplify delinquency collection.

126 CONG. REC. H7899 (daily ed. August 26, 1980) (statement of Rep. Thompson).

The NCCMP urges the Court to review the decision below because it places a burden on plan trustees that is inconsistent with the ruling in *Central States* and seriously undermines a primary purpose of the MPPAA.

IV. THE ERRONEOUS SUGGESTION BELOW THAT A MULTIEMPLOYER PLAN SUFFERS NO "INJURY IN FACT" WHEN A PARTICIPATING EMPLOYER FAILS TO KEEP STATUTORILY REQUIRED RECORDS COULD UNDERMINE THE ABILITY OF TRUSTEES TO VINDICATE HARMS TO THE PLAN.

The decision below turns on the majority's conclusion that the trustees herein allegedly failed to establish the "fact of damage." This concept appears to derive from this Court's decision in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946). In *Anderson*, the Court held that a plaintiff employee in a Fair Labor Standards Act case satisfies his burden of proof by establishing that he has performed work for which he was improperly compensated and by producing sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. 328 U.S. at 687-88. The Court found the rule against recoveries for uncertain and speculative damages inapplicable because the fact of damage—if not its extent—is certain in such a case. 328 U.S. at 688.

The majority below suggested that the "fact of damage" rule may be a requirement of constitutional dimensions. (Pet. App. 8a.) Citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000), the majority pointed to the need for a plaintiff to establish "injury in fact" as a component of Article III standing. The implication is, apparently, that a plan suffers no injury when an employer's inadequate recordkeeping makes a specific quantification of covered work impossible.

The suggestion is untenable. Putting aside the logical inference that such an employer likely *did* fail to document work for which contributions were owed, trustees in these circumstances in any event are harmed by virtue of their inability to readily verify the hours on which employees' entitlement to benefits must be based. The trustees in such circumstances suffer a cognizable injury traceable to the malfeasance of the employer and redressable in an action against that employer.

Unquestionably, an employer's failure to submit to an audit of all hours worked by employees constitutes an injury to the fund which is actionable in a suit by the trustees. *See, e.g., New York State Teamsters Conference Pension and Retirement Fund v. Boening Bros., Inc.*, 92 F.3d 127 (2d Cir. 1996). By statute, employers are obligated to provide to plan administrators information sufficient to allow the plans to inform employees of their accrued benefits. *See* 29 U.S.C. § 1059(a)(1). When employers fail to maintain and provide that information, the fund, the trustees and the participants all suffer harm. It is the trustees who are entitled, and indeed may be obligated, to take action to redress that injury, such as in an action to compel an audit. [12]

Despite this, the majority below in effect suggests that fund trustees may lack the requisite injury to support standing to vindicate an inability to identify and quantify work that may well be covered employment. Even as dicta, such a suggestion has the potential to do serious mischief by adding to the extraneous defenses that employers may raise in

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[12] In contrast, there is no express or implied right of action recognized for employees whose employers violate the recordkeeping violations imposed by the Fair Labor Standards Act. *See Floyd v. Excel Corp.*, 51 F. Supp. 2d 931, 934 n.5 (C.D. Ill. 1999); *East v. Bullock's, Inc.*, 34 F. Supp 2d 1176, 1182-83 (D. Ariz. 1998).

actions to enforce their reporting and contribution obligations. For this reason as well, the NCCMP urges the Court to grant the petition and to review and reverse the decision below.

CONCLUSION

For the foregoing reasons, the NCCMP respectfully urges the Court to review the decision below.

Respectfully submitted,

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